THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS

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"The transaction of business with foreign nations is executive altogether."—*Jefferson*

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PREFACE

The numerous interesting questions which have arisen since Mr. Wilson went to Washington as to the powers of the President in the diplomatic field suggested the idea that it might be worth while to bring together the principal historical incidents illustrating the subject and the most instructive parts of the discussions which these incidents evoked. It is fortunate that at the very outset of our national history a debate occurred between the two ablest members of the body which framed the Constitution bearing upon this subject, and disclosing its most fundamental issues. This was the debate between "Pacificus" (Hamilton) and "Helvidius" (Madison) which is included in Part I of this volume, while an interesting parallel to this early discussion is furnished by the debate between Senators Spooner and Bacon, upon the same issues, which makes up Part III. In Part II, which constitutes the main body of the book, I have had two objects in mind: first, to cull from a rather voluminous "literature" the best material perti-

nent to the subject, and secondly, to state succinctly the results that seem to spring from the discussions canvassed and from actual practice. For the most part, my indebtedness is simply to the sources, the *Annals,* the *Globe,* the *Record,* the *Reports,* the "Opinions of the Attorneys-General," and to the "Messages and Papers of the Presidents." Other minor obligations are duly recorded in the footnotes. E. S. C.

Princeton, August 15, 1917.

CONTENTS

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INTRODUCTION

The power of the national Government in the control of the foreign relations of the United States is both plenary and exclusive. The Court in the Chinese Exclusion Cases says:

> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . The control of local matters being left to local authorities, and national matters being intrusted to the Government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for the national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.[1]

The same idea is reiterated by the Court in Fong Yue Ting v. U. S. in the following words:

> The United States are a sovereign and independent nation, and are vested by the Constitution with the entire

[1] 130 U. S. 581, 604.

control of international relations, and with all the powers of government necessary to maintain that control and make it effective. The only government of this country, which other nations recognize or treat with, is the Government of the Union; and the only American flag known throughout the world is the flag of the United States.[2]

The powers, however, which compose this plenary control are shared by three branches of the national Government: Congress, the President, and the Senate. The clauses of the Constitution which give Congress its participation in the control of our foreign relations are the following, in Article I, Section 8:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . to regulate commerce with foreign nations; . . . to establish an uniform rule of naturalization; . . . to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer time than two years; to provide and maintain a navy; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The President's powers in the same connection, shared in some instances by the Senate, spring from the following provisions of the Constitution, in Sections 1, 2, and 3 of Article II:

[2] 149 U. S. 698, 711. See also C. J. Taney's opinion in Holmes v. Jennison, 14 Peters 540, 569 ff.

The executive power shall be vested in a President of the United States of America. . . . The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; . . . he shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls. . . . The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. . . . He shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Finally, Article VI, Paragraph 2, of the Constitution provides that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The questions that have arisen on the basis of the above provisions of the Constitution, so far as they touch the subject of the control of our foreign relations, are of two classes: first, those which have arisen because of the insufficiency of these provisions, without construction, to afford the national Government its putative complete sovereignty in this field; secondly, those which have arisen because of the fact

that the powers bestowed by these provisions on different organs frequently overlap.

Illustrations of the first class of questions are the following: Congress is given the power to declare war; the President and the Senate are given the power to make peace by treaty; but on the subject of neutrality the Constitution is silent. It is also silent on the subject of abrogating treaties; also, on the subject of according recognition to new governments; also, on the subject of international agreements short of treaties, etc.

Illustrations of the second class of questions will occur to any reader. Thus Congress is given the power to declare war, while treaties are made by the President and the Senate. Suppose that the President and the Senate make a treaty of alliance with another government by the terms of which the United States becomes obligated at a particular moment to declare war on a third power: is Congress under constitutional obligation so to declare war? Or, suppose that before a treaty made in due form by the President and the Senate can be carried out, Congress must vote an appropriation: is it constitutionally bound to do so? This question, in fact, arose in 1796,[3] in connection with the unpopular Jay Treaty, and it has been suggested in similar situations many times since, though actually Congress seems never to have refused the required appropriation.

The principles that have been developed in the solu-

[3] See Part II, Chapter III, Section 2, dealing with the enforcement of treaties.

tion of these questions will appear more in detail in Part Two of this work, but for the guidance of the reader the two preeminent ones should be stated briefly at this point: First, the gaps above alluded to in the constitutional delegation of powers to the national Government, affecting foreign relations, have been filled in by the theory that the control of foreign relations is in its nature an executive function and one, therefore, which belongs to the President in the absence of specific constitutional provision to the contrary. But, as the debate given in Part I between "Pacificus" (Hamilton) and "Helvidius" (Madison) shows, the theory was, to begin with, vigorously disputed.

Secondly, the difficulty arising from overlapping powers has been met by attributing to the respective bearers of such powers full constitutional discretion in their discharge. The difficulty has, in other words, been converted from a legal one to a political one, with the result that the real solution has to be sought as each case arises by the methods of compromise and practical statesmanship. Thus if the President, in the exercise of his powers, brings the country at any time to the verge of war, Congress still retains theoretically its discretion in the matter of declaring war, but actually no President has ever ventured so far to lose touch with Congress that the latter has not supported his foreign policy, even to the last resort, though such a case came near occurring in Tyler's administration.

But the reader may at this point object that, since the initiative in foreign intercourse has largely passed

to the President, Congress is generally at a great disadvantage in attempting to assert its viewpoint in such matters, even in the discharge of its acknowledged powers. This is no doubt true to an extent, though we must not forget either the disadvantages of the President's position. In the first place, the President must discharge his functions ordinarily through the agencies provided by Congress, by virtue of its power to "pass all laws necessary and proper for carrying into execution . . . all powers vested by this Constitution in the Government of the United States, or any department or officer thereof." In the second place, the President may expend the public revenue only for the purposes which Congress may choose to dictate. Finally, the President is under direct constitutional obligation to "take care that the laws be faithfully executed."

The actual necessities of the case have more and more centred the initiative in directing our foreign policy in the hands of the President. But this is far from saying that the President is even yet an autocrat in this field. And so long as the above mentioned checks upon his power subsist, it is difficult to see how he can become an autocrat, save at extraordinary moments and when backed by the overwhelming approval of American public opinion.

PART ONE: THE GENERAL ISSUE

CHAPTER I

"PACIFICUS" AND "HELVIDIUS"

Upon the outbreak of war between France and Great Britain in 1793 Washington, under date of April 22 of that year, issued what is usually called a Proclamation of Neutrality.[1] The proclamation, which was drafted by Jay, declared the intention of the United States to "pursue a course friendly and impartial to both belligerent powers," and enjoined upon all citizens its observance upon pain of prosecution.[2] Though it avoided the use of the word "neutrality," the document was soon attacked by French sympathizers as beyond the President's power to issue, as well as upon other grounds. The defense of the

[1] For the text of the Proclamation, see Wm. MacDonald, *Documentary Source Book of American History,* p. 243.

[2] For a prosecution that took place in pursuance of this threat, see Gideon Henfield's Case, Wharton's *State Trials,* p. 49; *Federal Cases,* No. 6360. The prosecution, which was sustained by the United States Circuit Court at Philadelphia, comprising Justices Wilson and Iredell of the Supreme Court, and District Judge Peters, was based on the theory that the Federal courts have a common law jurisdiction of offenses against the sovereignty of the United States, an idea which has long since disappeared. See U. S. v. Goodwin, 7 Cranch 32; Wheaton v. Peters, 8 Peters 591.

proclamation was thereupon undertaken by Hamilton in a series of eight articles contributed to *The Gazette of the United States* (Philadelphia), under the pseudonym "Pacificus." The first article, dated June 29, 1793, alone deals with the constitutional question. It follows:

No. 1

As attempts are making, very dangerous to the peace, and, it is to be feared, not very friendly to the Constitution of the United States, it becomes the duty of those who wish well to both, to endeavor to prevent their success.

The objections which have been raised against the proclamation of neutrality, lately issued by the president, have been urged in a spirit of acrimony and invective, which demonstrates that more was in view than merely a free discussion of an important public measure. They exhibit evident indications of a design to weaken the confidence of the people in the author of the measure, in order to remove or lessen a powerful obstacle to the success of an opposition to the government, which, however it may change its form according to circumstances, seems still to be persisted in with unremitting industry.

This reflection adds to the motives connected with the measure itself, to recommend endeavors, by proper explanations, to place it in a just light. Such explanations, at least, cannot but be satisfactory to those who may not themselves have leisure or opportunity for pursuing an investigation of the subject, and who may wish to perceive that the policy of the government is not inconsistent with its obligations or its honor.

The objections in question fall under four heads:

1 That the proclamation was without authority.

2 That it was contrary to our treaties with France.

3 That it was contrary to the gratitude which is due from this to that country, for the succors afforded to us in our own revolution.

4 That it was out of time and unnecessary.

In order to judge of the solidity of the first of these objections, it is necessary to examine what is the nature and design of a proclamation of neutrality.

It is to *make known* to the powers at war, and to the citizens of the country whose government does the act, that such country is in the condition of a nation at peace with the belligerent parties, and under no obligations of treaty to become an *associate in the war* with either, and that this being its situation, its intention is to observe a corresponding conduct, by performing towards each the duties of neutrality; to warn all persons within the jurisdiction of that country, to abstain from acts that shall contravene those duties, under the penalties which the laws of the land, of which the *jus gentium* is part, will inflict.

This, and no more, is conceived to be the true import of a proclamation of neutrality. . . .

If this be a just view of the force and import of the proclamation, it will remain to see, whether the president, in issuing it, acted within his proper sphere, or stepped beyond the bounds of his constitutional authority and duty.

It will not be disputed, that the management of the affairs of this country with foreign nations is confided to the government of the United States.

It can as little be disputed, that a proclamation of neutrality, when a nation is at liberty to decline or avoid a war in which other nations are engaged, and means to do so, is a *usual* and a *proper* measure. *Its main object is to prevent the nation's being responsible for acts done by its citizens, without the privity or connivance of the government, in contravention of the principles of neutrality;* an object of the greatest moment to a country whose true interest lies in the preservation of peace.

The inquiry then is, what department of our government is the proper one to make a declaration of neutrality, when the engagements of the nation permit, and its interests require that it should be done?

A correct mind will discern at once, that it can belong neither to the legislative nor judicial department, of course must belong to the executive.

The legislative department is not the *organ* of intercourse between the United States and foreign nations. It is charged neither with *making* nor *interpreting* treaties. It is therefore not naturally that member of the government, which is to pronounce the existing condition of the nation, with regard to foreign powers, or to admonish the citizens of their obligations and duties in consequence; still less is it charged with enforcing the observance of those obligations and duties.

It is equally obvious, that the act in question is foreign to the judiciary department. The province of that department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties, but it exercises this function only where contending parties bring before it a specific controversy. It has no concern with pronouncing upon the external political relations of treaties between government and government. This position is too plain to need being insisted upon.

It must then of necessity belong to the executive department to exercise the function in question, when a proper case for it occurs.

It appears to be connected with that department in various capacities:—As the *organ* of intercourse between the nation and foreign nations; as the *interpreter* of the national treaties, in those cases in which the judiciary is not competent, that is, between government and government; as the *power* which is charged with the execution of the laws, of which treaties form a part; as that which is charged with the command and disposition of the public force.

This view of the subject is so natural and obvious, so analogous to general theory and practice, that no doubt can be entertained of its justness, unless to be deduced from particular provisions of the Constitution of the United States.

Let us see, then, if cause for such doubt is to be found there.

The second article of the Constitution of the United States, section first, establishes this general proposition, that "the EXECUTIVE POWER shall be vested in a President of the United States of America."

The same article, in a succeeding section, proceeds to delineate particular cases of executive power. It declares, among other things, that the president shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; that he shall have power, by and with the advice and consent of the senate, to make treaties; that it shall be his duty to receive ambassadors and other public ministers, *and to take care that the laws be faithfully executed.*

It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the senate in the appointment of officers, and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties. The difficulty of a complete enumeration of all the cases of executive authority, would naturally dictate the use of general terms, and would render it improbable that a specification of certain particulars was designed as a substitute for those terms, when antecedently used. The different mode of expression employed in the constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are, "All legislative powers herein granted shall be vested in a congress of the United States." In that which grants the executive power, the expressions are, "*The executive power* shall be vested in a President of the United States."

The enumeration ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.

The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the Presi-

dent; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument.

Two of these have been already noticed; the participation of the senate in the appointment of officers, and in the making of treaties. A third remains to be mentioned; the right of the legislature "to declare war, and grant letters of marque and reprisal."

With these exceptions, the *executive power* of the United States is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate; of which the power of removal from office is an important instance. It will follow, that if a proclamation of neutrality is merely an executive act, as it is believed has been shown, the step which has been taken by the President is liable to no just exception on the score of authority.

It may be said, that this inference would be just, if the power of declaring war had not been vested in the legislature; but that this power naturally includes the right of judging, whether the nation is or is not under obligation to make war.

The answer is, that however true this position may be, it will not follow, that the executive is in any case excluded from a similar right of judgment, in the execution of its own functions.

If on the one hand, the legislature have a right to declare war, it is on the other, the duty of the executive to preserve peace, till the declaration is made; and in fulfilling this duty, it must necessarily possess a right of judging what is the nature of the obligations which the treaties of the country impose on the government; and when it has concluded that there is nothing in them inconsistent with neutrality, it becomes both its province and its duty to enforce the laws incident to that state of the nation. The executive is charged with the execution of all laws, the law of nations, as well as the municipal law, by which the former are recognized and adopted. It is consequently bound, by executing faithfully the laws of neutrality, when the country is in a neutral position, to avoid giving cause of war to foreign powers.

This is the direct end of the proclamation of neutrality. It declares to the United States their situation with regard to the contending parties, and makes known to the community, that the laws incident to that state will be enforced. In doing this, it conforms to an established usage of nations, the operation of which, as before remarked, is to obviate a responsibility on the part of the whole society, for secret and unknown violation of the rights of any of the warring powers by its citizens.

Those who object to the proclamation will readily admit, that it is the right and duty of the executive to interpret those articles of our treaties which give to France particular privileges, in order to the enforcement of them: but the necessary consequence of this is, that the executive must judge what are their proper limits; what rights are given to other nations, by our contracts with them; what rights the law of nature and nations gives, and our treaties permit, in respect to those countries with which we have none; in fine, what are the reciprocal rights and obligations of the United States and of all and each of the powers at war.

The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognised, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is *acknowledged,* the treaties between the nations, so far at least as regards *public* rights, are of course suspended.

This power of determining virtually upon the operation of national treaties, as a consequence of the power to receive public ministers, is an important instance of the right of the executive, to decide upon the obligations of the country with regard to foreign nations. To apply it to the case of France, if there had been a treaty of alliance, *offensive* and defensive between the United States and that country, the unqualified acknowledg-

ment of the new government would have put the United States in a condition to become an associate in the war with France, and would have laid the legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war.

This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decision.

The division of the executive power in the Constitution, creates a *concurrent* authority in the cases to which it relates.

Hence, in the instance stated, treaties can only be made by the president and senate jointly; but their activity may be continued or suspended by the President alone.

No objection has been made to the President's having acknowledged the republic of France, by the reception of its minister, without having consulted the senate; though that body is connected with him in the making of treaties, and though the consequence of his act of reception is, to give operation to those heretofore made with that country. But he is censured for having declared the United States to be in a state of peace and neutrality, with regard to the powers at war; because the right of *changing* that state, and *declaring war,* belongs to the legislature.

It deserves to be remarked, that as the participation of the senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

While, therefore, the legislature can alone declare war, can alone actually transfer the nation from a state of

peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers.

In this distribution of authority, the wisdom of our Constitution is manifested. It is the province and duty of the executive to preserve to the nation the blessings of peace. The legislature alone can interrupt them by placing the nation in a state of war.

But though it has been thought advisable to vindicate the authority of the executive on this broad and comprehensive ground, it was not absolutely necessary to do so. That clause of the Constitution which makes it his duty to "take care that the laws be faithfully executed," might alone have been relied upon, and this simple process of argument pursued.

The President is the Constitutional EXECUTOR of the laws. Our treaties, and the laws of nations, form a part of the law of the land. He, who is to execute the laws, must first judge for himself of their meaning. In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the President to judge for himself, whether there was anything in our treaties, incompatible with an adherence to neutrality. Having decided that there was not, he had a right, and if in his opinion the interest of the nation required it, it was his duty as executor of the laws, to proclaim the neutrality of the nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non-observance.

The proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact*, with regard to the *existing state* of the nation; informs the citizens of what the laws previously established require of them in that state, and notifies them that these laws will be put in execution against the infractors of them.[3]

[3] *The Works of Alexander Hamilton* (J. C. Hamilton, Editor), VII, p. 76 ff.

Jefferson, though he had approved of the Proclamation of Neutrality, was quite ready to make whatever political capital he could out of the opposition to it. He was, accordingly, considerably exercised at the pronounced effect of Hamilton's letters in support of the proclamation. "Nobody," he wrote Madison on July 7, "answers him and his doctrines will therefore be taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies, and cut him to pieces in face of the public. There is nobody else who can and will enter the lists against him."[4] Madison complied, though with some reluctance, in the letters of "Helvidius," which ran in the *Gazette* from August 24 to September 18, being five in number in all. The following extracts from the first three numbers give the burden of Madison's argument, which it will be seen is confined to the constitutional question:

No. I

Several pieces with the signature of PACIFICUS were lately published, which have been read with singular pleasure and applause, by the foreigners and degenerate citizens among us, who hate our republican government, and the French revolution; whilst the publication seems to have been too little regarded, or too much despised by the steady friends of both. . . .

The substance of the first piece, sifted from its inconsistencies and its vague expressions, may be thrown into the following propositions:

That the powers of declaring war and making treaties are, in their nature, executive powers:

That being particularly vested by the constitution in

[4] *Writings of Thomas Jefferson* (P. L. Ford, Editor), VI, p. 338.

other departments, they are to be considered as exceptions out of the general grant to the executive department:

That being, as exceptions, to be construed strictly, the powers not strictly within them, remain with the executive:

That the Executive consequently, as the organ of intercourse with foreign nations, is authorized to expound all articles of treaties, those involving questions of war and peace, as well as others;—to judge of the obligations of the United States to make war or not, under any *casus foederis* or eventual operation of the contract, relating to war; and to pronounce the state of things resulting from the obligations of the United States, as understood by the executive:

That in particular the executive had authority to judge, whether in the case of the mutual guaranty between the United States and France, the former were bound by it to engage in the war:

That the executive has, in pursuance of that authority, decided that the United States are not bound:—and,

That its proclamation of the 22nd of April last, is to be taken as the effect and expression of that decision. . . .

If there be any countenance to these positions, it must be found either, first, in the writers of authority on public law; or, 2d, in the quality and operation of the powers to make war and treaties; or, 3d, in the constitution of the United States. . . .

3 It remains to be inquired, whether there be any thing in the constitution itself, which shows, that the powers of making war and peace are considered as of an executive nature, and as comprehended within a general grant of executive power.

It will not be pretended, that this appears from any *direct* position to be found in the instrument.

If it were *deducible* from any particular expressions, it may be presumed, that the publication would have saved us the trouble of the research.

Does the doctrine, then, result from the actual distribution of powers among the several branches of the government? or from any fair analogy between the

powers of war and treaty, and the enumerated powers vested in the executive alone?

Let us examine:

In the general distribution of powers, we find that of declaring war expressly vested in the congress, where every other legislative power is declared to be vested; and without any other qualifications than what is common to every other legislative act. The constitutional idea of this power would seem then clearly to be, that it is of a legislative and not an executive nature.

This conclusion becomes irresistible, when it is recollected, that the constitution cannot be supposed to have placed either any power legislative in its nature, entirely among executive powers, or any power executive in its nature, entirely among legislative powers, without charging the constitution, with that kind of intermixture and consolidation of different powers, which would violate a fundamental principle in the organization of free governments. If it were not unnecessary to enlarge on this topic here, it could be shown, that the constitution was originally vindicated, and has been constantly expounded, with a disavowal of any such intermixture.

The power of treaties is vested jointly in the president and in the senate, which is a branch of the legislature. From this arrangement merely, there can be no inference that would necessarily exclude the power from the executive class: since the senate is joined with the president in another power, that of appointing to offices, which, as far as relate to executive offices at least, is considered as of an executive nature. Yet on the other hand, there are sufficient indications that the power of treaties is regarded by the constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive character.

One circumstance indicating this, is the constitutional regulation under which the senate give their consent in the case of treaties. In all other cases, the consent of the body is expressed by a majority of voices. In this particular case, a concurrence of two-thirds at least is made necessary, as a substitute or compensation for the

other branch of the legislature, which, on certain occasions, could not be conveniently a party to the transaction.

But the conclusive circumstance is, that treaties, when formed according to the constitutional mode, are confessedly to have force and operation of *laws*, and are to be a rule for the courts in controversies between man and man, as much as any *other laws*. They are even emphatically declared by the constitution to be "the supreme law of the land."

So far the argument from the constitution is precisely in opposition to the doctrine. As little will be gained in its favour from a comparison of the two powers, with those particularly vested in the president alone.

As there are but few, it will be most satisfactory to review them one by one.

"The president shall be commander in chief of the army and navy of the United States, and of the militia when called into the actual service of the United States."

There can be no relation worth examining between this power and the general power of making treaties. And instead of being analogous to the power of declaring war, it affords a striking illustration of the incompatibility of the two powers in the same hands. Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued,* or *concluded.* They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

"He may require the opinion in writing of the principal officers in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment." These powers can have nothing to do with the subject.

"The president shall have power to fill up vacancies that may happen during the recess of the Senate, by

granting commissions which shall expire at the end of the next session." The same remark is applicable to this power, as also to that of "receiving ambassadors, other public ministers, and consuls." The particular use attempted to be made of this last power will be considered in another place.

"He shall take care that the laws shall be faithfully executed, and shall commission all officers of the United States." To see the laws faithfully executed constitutes the essence of the executive authority. But what relation has it to the power of making treaties and war, that is, of determining what the *laws shall be* with regard to other nations? No other certainly than what subsists between the powers of executing and enacting laws; no other, consequently, than what forbids a coalition of the powers in the same department.

I pass over the few other specified functions assigned to the president, such as that of convening the legislature, &c., &c., which cannot be drawn into the present question.

It may be proper however to take notice of the power of removal from office, which appears to have been adjudged to the president by the laws establishing the executive departments; and which the writer has endeavoured to press into his service. To justify any favourable inference from this case, it must be shown, that the powers of war and treaties are of a kindred nature to the power of removal, or at least are equally within a grant of executive power. Nothing of this sort has been attempted, nor probably will be attempted. Nothing can in truth be clearer, than that no analogy, or shade of analogy, can be traced between a power in the supreme officer responsible for the faithful execution of the laws, to displace a subaltern officer employed in the execution of the laws; and a power to make treaties and to declare war, such as these have been found to be in their nature, their operation, and their consequences.

Thus it appears that by whatever standard we try this doctrine, it must be condemned as no less vicious in theory than it would be dangerous in practice. It is countenanced neither by the writers on law; nor by the

nature of the powers themselves; nor by any general arrangements, or particular expressions, or plausible analogies, to be found in the constitution.

Whence then can the writer have borrowed it?

There is but one answer to this question.

The power of making treaties and the power of declaring war, are *royal prerogatives* in the *British government*, and are accordingly treated as *executive prerogatives* by British *commentators*. . . .

No. 2

Leaving however to the leisure of the reader deductions which the author, having omitted, might not choose to own, I proceed to the examination of one, with which that liberty cannot be taken.

"However true it may be, (says he,) that the right of the legislature to declare war *includes the right of judging*, whether the legislature be under obligations to make war or not, it will not follow that the executive is *in any case* excluded from a *similar right* of judging in the execution of its own functions."

A material error of the writer, in this application of his doctrine, lies in his shrinking from its regular consequences. Had he stuck to his principle in its full extent, and reasoned from it without restraint, he would only have had to defend himself against his opponents. By yielding the great point, that the right to declare war, *though to be taken strictly*, includes the right to judge, whether the nation be under obligation to make war or not, he is compelled to defend his argument, not only against others, but against himself also. Observe, how he struggles in his own toils.

He had before admitted, that the right to declare war is vested in the legislature. He here admits, that the right to declare war includes the right to judge, whether the United States be obliged to declare war or not. Can the inference be avoided, that the executive, instead of having a similar right to judge, is as much excluded from the right to judge as from the right to declare?

If the right to declare war be an exception out of the

general grant to the executive power, every thing included in the right must be included in the exception; and, being included in the exception, is excluded from the grant. . . .

There can be no refuge against this conclusion, but in the pretext of a *concurrent* right in both departments to judge of the obligations to declare war; and this must be intended by the writer, when he says, "It will not follow, that the executive is excluded *in any case* from a *similar right* of judging," &c. . . .

A concurrent authority in two independent departments, to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.

If the legislature and executive have both a right to judge of the obligations to make war or not, it must sometimes happen, though not at present, that they will judge differently. The executive may proceed to consider the question to-day; may determine that the United States are not bound to take part in a war, and, *in the execution of its functions,* proclaim that declaration to all the world. Tomorrow the legislature may follow in the consideration of the same subject; may determine that the obligations impose war on the United States, and, *in the execution of its functions,* enter into a *constitutional declaration,* expressly contradicting the *constitutional proclamation.*

In what light does this present the constitution to the people who established it? In what light would it present to the world a nation, thus speaking, through two different organs, equally constitutional and authentic, two opposite languages, on the same subject, and under the same existing circumstances?

But it is not with the legislative rights alone that this doctrine interferes. The rights of the judiciary may be equally invaded. For it is clear that if a right declared by the constitution to be legislative, leaves, notwithstanding, a similar right in the executive, whenever a case for exercising it occurs, *in the course of its functions;* a right declared to be judiciary and vested in that de-

partment may, on the same principle, be assumed and exercised by the executive *in the course of its functions;* and it is evident that occasions and pretexts for the latter interference may be as frequent as for the former. So again the judiciary department may find equal occasions in the execution of *its* functions, for usurping the authorities of the executive; and the legislature for stepping into the jurisdiction of both. And thus all the powers of government, of which a partition is so carefully made among the several branches, would be thrown into absolute hotchpot, and exposed to a general scramble. . . .

No. 3

In order to give colour to a right in the executive to exercise the legislative power of judging, whether there be a cause of war in a public stipulation—two other arguments are subjoined by the writer to that last examined.

The first is simply this: "It is the right and duty of the executive to judge of and interpret those articles of our treaties which give to France particular privileges, *in order to the enforcement of those privileges*"; from which it is stated, as a necessary consequence, that the executive has certain other rights, among which is the right in question.

This argument is answered by a very obvious distinction. The first right is essential to the execution of the treaty, *as a law in operation,* and interferes with no right vested in another department. The second, viz., the right in question, is not essential to the execution of the treaty, or any other law: on the contrary, the article to which the right is applied cannot, as has been shown, from the very nature of it, be *in operation* as a law, without a previous declaration of the legislature; and all the laws to be *enforced* by the executive remain, in the mean time, precisely the same, whatever be the disposition or judgment of the executive. This second right would also interfere with a right acknowledged to be in the legislative department.

If nothing else could suggest this distinction to the

writer, he ought to have been reminded of it by his own words, "in order to the enforcement of those privileges". —Was it in order to *the enforcement* of the article of guaranty, that the right is ascribed to the executive?

The other of the two arguments reduces itself into the following form: the executive has the right to receive public ministers; this right includes the right of deciding, in the case of a revolution, whether the new government, sending the minister, ought to be recognised, or not; and this, again, the right to give or refuse operation to preexisting treaties.

The power of the legislature to declare war, and judge of the causes for declaring it, is one of the most express and explicit parts of the constitution. To endeavour to abridge or *affect* it by strained inferences, and by hypothetical or singular occurrences, naturally warns the reader of some lurking fallacy.

The words of the constitution are, "He (the president) shall receive ambassadors, other public ministers, and consuls." I shall not undertake to examine, what would be the precise extent and effect of this function in various cases which fancy may suggest, or which time may produce. It will be more proper to observe, in general, and every candid reader will second the observation, that little, if anything, more was intended by the clause, than to provide for a particular mode of communication, *almost* grown into a right among modern nations; by pointing out the department of the government, most proper for the ceremony of admitting public ministers, of examining their credentials, and of authenticating their title to the privileges annexed to their character by the law of nations. This being the apparent design of the constitution, it would be highly improper to magnify the function into an important prerogative, even where no rights of other departments could be affected by it. . . .

But how does it follow from the function to receive ambassadors and other public ministers, that so consequential a prerogative may be exercised by the executive? When a foreign minister presents himself, two questions

immediately arise: Are his credentials from the existing and acting government of his country? Are they properly authenticated? These questions belong of necessity to the executive; but they involve no cognizance of the question, whether those exercising the government have the right along with the possession. This belongs to the nation, and to the nation alone, on whom the government operates. The questions before the executive are merely questions of fact; and the executive would have precisely the same right, or rather be under the same necessity of deciding them, if its function was simply to receive *without any discretion to reject* public ministers. It is evident, therefore, that if the executive has a right to reject a public minister, it must be founded on some other consideration than a change in the government, or the newness of the government; and consequently a right to refuse to acknowledge a new government cannot be implied by the right to refuse a public minister.

It is not denied that there may be cases in which a respect to the general principles of liberty, the essential rights of the people, or the overruling sentiments of humanity, might require a government, whether new or old, to be treated as an illegitimate despotism. Such are in fact discussed and admitted by the most approved authorities. But they are great and extraordinary cases, by no means submitted to so limited an organ of the national will as the executive of the United States; and certainly not to be brought by any torture of words, within the right to receive ambassadors.

That the authority of the executive does not extend to a question, whether an *existing* government ought to be recognised or not, will still more clearly appear from an examination of the next inference of the writer, to wit: that the executive has a right to give or refuse activity and operation to preexisting treaties.

If there be a principle that ought not to be questioned within the United States, it is, that every nation has a right to abolish an old government and establish a new one. This principle is not only recorded in every public archive, written in every American heart, and sealed with

the blood of a host of American martyrs; but is the only lawful tenure by which the United States hold their existence as a nation.

It is a principle incorporated with the above, that governments are established for the national good, and are organs of the national will.

From these two principles results a third, that treaties formed by the government, are treaties of the nation, unless otherwise expressed in the treaties. . . .

As a change of government then makes no change in the obligations or rights of the party to a treaty, it is clear that the executive can have no more right to suspend or prevent the operation of a treaty, on account of the change, than to suspend or prevent the operation, where no such change has happened. Nor can it have any more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law. . . .

Yet allowing it to be, as contended, that a suspension of treaties might happen from a *consequential* operation of a right to receive public ministers, which is an *express right* vested by the constitution; it could be no proof, that the same or a *similar* effect could be produced by the *direct* operation of a *constructive power*.

Hence the embarrassments and gross contradictions of the writer in defining, and applying his ultimate inference from the operation of the executive power with regard to public ministers.

At first it exhibits an "important instance of the right of the executive to decide the obligation of the nation with regard to foreign nations."

Rising from that, it confers on the executive, a right "to put the United States in a condition to become an associate in war."

And at its full height, it authorizes the executive "to lay the legislature under *an obligation* of declaring war."

From this towering prerogative, it suddenly brings down the executive to the right of *"consequentially affecting* the proper or improper exercise of the power of the legislature to declare war."

And then, by a caprice as unexpected as it is sudden,

it espouses the cause of the legislature; rescues it from the executive right "to lay it under an *obligation* of declaring war"; and asserts it to be "free to perform its *own* duties according to its *own* sense of them," without any other control than what it is liable to, in every other legislative act.

The point at which it finally seems to rest, is, that "the executive, in the exercise of its *constitutional powers,* may establish an antecedent state of things, which ought to *weigh* in the *legislative decisions*"; a prerogative which will import a great deal, or nothing, according to the handle by which you take it; and which at the same time, you can take by no handle that does not clash with some inference preceding.

If "by weighing in the legislative decisions" he meant having *an influence* on the *expediency* of this or that decision in the *opinion* of the legislature; this is no more than what every antecedent state of things ought to have, from whatever cause proceeding; whether from the use or abuse of constitutional powers, or from the exercise of constitutional or assumed powers. In this sense, the power to establish an antecedent state of things is not contested. But then it is of no use to the writer, and is also in direct contradiction to the inference, that the executive may "lay the *legislature* under an *obligation* to decide in favour of *war.*"

If the meaning be as is implied by the force of the terms "constitutional powers," that the antecedent state of things produced by the executive, ought to have a *constitutional weight* with the legislature; or, in plainer words, imposes a *constitutional obligation* on the *legislative decisions;* the writer will not only have to combat the arguments by which such a prerogative has been disproved; but to reconcile it with his last concession, that "the legislature is *free* to perform its duties according to its *own* sense of them." He must show that the legislature is, at the same time *constitutionally free* to pursue its *own judgment,* and *constitutionally bound* by the *judgment of the executive.*[5]

[5] *The Writings of James Madison* (Gaillard Hunt, Editor), VI, p. 138 ff.

Hamilton's argument is reducible to two propositions: first, that the conduct of the foreign relations of a state is in its nature an executive function and therefore, except where the Constitution provides otherwise, belongs to the President, upon whom the Constitution bestows "the executive power"; secondly, that the possession by Congress of the power to declare war, and similar powers, does not diminish the discretion of the President in the exercise of the powers constitutionally belonging to him, and vice versa. Madison's answer likewise comprises two main points: first, he attempts to elbow aside the claims of the "executive power" to determine foreign relations by bringing into the foreground the war declaring power of Congress; secondly, he urges the inconvenience and confusion likely to flow from the conception of concurrent discretionary powers in the hands of different departments.

The great shortcoming of Madison's argument, with all its logical acuteness, is its negative character, its failure to suggest either a logical or a practicable construction of the Constitution to take the place of the one it combats. Also, Madison's argument is somewhat inconsistent with arguments made by him both before this date and afterward. Thus he here implies that the "executive power" with which the President is vested by the opening clause of Article II is not to be taken as bestowing other powers than those more specifically mentioned in the rest of the article. Yet when, in 1789, the question of the location of the

power of removal, which is not dealt with by name in the Constitution, was before Congress, he had made the following argument:

The constitution affirms, that the executive power shall be vested in the president. Are there exceptions to this proposition? Yes, there are. The constitution says that, in appointing to office, the senate shall be associated with the president, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the president, I venture to assert, that the legislature has no right to diminish or modify his executive authority.

The question now resolves itself into this, Is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws. If the constitution had not qualified the power of the president in appointing to office, by associating the senate with him in that business, would it not be clear that he would have the right, by virtue of his executive power, to make such appointment? Should we be authorised, in defiance of that clause in the constitution—"The executive power shall be vested in a president," to unite the senate with the president in the appointment to office? I conceive not. If it is admitted we should not be authorised to do this, I think it may be disputed whether we have a right to associate them in removing persons from office, the one power being as much of an executive nature as the other; and the first only is authorised by being excepted out of the general rule established by the constitution, in these words, "The executive power shall be vested in the president."[6]

It may be true, as Madison says, in a passage

[6] Elliot's *Debates* (Phila., 1836), IV, pp. 343-4.

quoted above, that there is no analogy between the power of declaring war or that of making treaties and the power of removal. But that fact hardly removes the inconsistency that results from his invoking the opening clause of Article II as a source of Presidential power.[7]

Again, in 1796, Madison was among the foremost of those who insisted upon the right of the House of Representatives to pass upon the merits of the Jay Treaty preliminary to voting the money necessary to carry it into execution. He was unquestionably correct in his position; but if so, then so was Hamilton correct in insisting upon the constitutional right of the President to declare the neutrality of the United States even though subsequently Congress might determine to declare war.

Finally, in connection with the general question of the scope of the executive power of the President, it is interesting to consider the following passages from the opinion of Justice Brewer in the case of Kansas v. Colorado, where the immediate question before the Court was the scope of the "judicial power" conferred upon the courts of the United States by Article III of the Constitution:

[7] The question of recognition, which Hamilton and Madison touch upon incidentally, is dealt with *infra,* in Part II, Chapter II, Section 5. By the great weight of authority, it is an executive function; but Madison was right in his statement of the essential principle governing its exercise, namely, that new governments or communities are to be viewed, not as legitimate or illegitimate, but simply as political entities. However, a recent departure from this doctrine is noted *infra.*

In the Constitution are provisions in separate articles for the three great departments of government,—legislative, executive, and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: 'Article I, Par. 1. All legislative powers herein granted shall be vested in a Congress.' etc.; and then in section 8, mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. . . .

On the other hand, in article 3, which treats of the judicial department . . . we find that Par. 1 reads that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.' By this is granted the entire judicial power of the nation. Section 2, which provides that 'the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States," etc., is not a limitation nor an enumeration. It is a definite declaration,—a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but, if there are any, they must be expressed; for otherwise the general grant would vest in the courts all the judicial power which the new nation was capable of exercising. . . .

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and, when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to

embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto. . . .

These considerations lead to the propositions that when a legislative power is claimed for the national government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication; whereas, in respect to judicial functions, the question is whether there be any limitations expressed in the Constitution on the general grant of national power.[8]

The source of this line of reasoning is obviously Hamilton's argument, which it may be regarded as clothing with judicial sanction.

[8] 206 U. S. 46, 81-3.

PART TWO: TOPICS AND PRECEDENTS

CHAPTER II

Diplomatic Intercourse, Its Incidents and Agents—Recognition

1—The President is the organ of diplomatic intercourse of the Government of the United States, first, because of his powers in connection with the reception and dispatch of diplomatic agents and with treaty making; secondly, because of the tradition of executive power adherent to his office.

A dependable British authority points out that the making of treaties and all matters affecting the foreign relations of Great Britain fall to the royal prerogative, that until late years treaties were not brought before Parliament until after ratification, and that the initiation of the foreign policy of the Kingdom belongs to the executive exclusively.[1]

The view which was held of executive power at the time of the adoption of the Constitution is also to be found exemplified in the early State Constitutions. On this point President Goodnow remarks as follows:

> The American conception of the executive power prevailing at the time of the adoption of the United States Constitution corresponded with that part of the executive

[1] Todd, *Parliamentary Government*, I, pp. 307-9.

power which has been called political. The great exception to this statement is to be found in the fact that the carrying on of the foreign relations was not included within the powers of the state governor. This exception does not, however, prove that the diplomatic power was not considered a part of the executive power. The omission of the diplomatic power from among the powers of the governor was due entirely to the peculiar position of the colonies and later of the states. The care of the foreign relations was not in the governor's hands, simply because during the colonial period the mother country, and during the existence of the states as sovereign states the Continental Congress, attended to the matter.[2]

The views of certain theoretical writers who were influential with the framers of the Constitution are likewise in point in this connection. Thus Locke, in his "Second Treatise on Civil Government," writes as follows of the conduct of his Commonwealth's relations with other states:

There is another power in every commonwealth which one may call natural, because it is that which answers to the power every man naturally had before he entered into society. For though in a commonwealth the members of it are distinct persons still, in reference to one another, and, as such, are governed by the laws of the society, yet, in reference to the rest of mankind, they make one body, which is, as every member of it before was, still in the state of Nature with the rest of mankind, so that the controversies that happen between any man of the society with those that are out of it are managed by the public, and an injury done to a member of their body engages the whole in the reparation of it. . . . This, therefore, contains the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth, and may be called federative if any one pleases. So the

[2] *Principles of Administrative Law in the United States*, p. 70.

thing be understood, I am indifferent as to the name. . . .

Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons. For both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct and not subordinate hands, or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.[3]

Another work of vast influence with the framers of the Constitution was Montesquieu's "Spirit of the Laws," which describes executive power in the following passage:

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simply the executive power of the state.[4]

2—But if the President is the organ of diplomatic intercourse with other states, two things follow: first that this power is presumptively his alone, even though the powers of other organs may frequently produce

[3] *Op. cit.*, §§ 145-6, 148.
[4] *Op. cit.*, bk. XI, ch. 6.

like results; second, that his discretion in its discharge is not legally subject to any other organ of government, albeit it may clash with a like discretion in such organ in the discharge of its own constitutional functions. With regard to the first of these propositions the following passage from a report of the Foreign Relations Committee of the Senate is in point:

If any given power belongs to the executive branch of the Government, presumptively it does not belong to the legislative branch.

It is clear all through the Constitution, and has never been disputed, that the intention was to distribute the powers of the Government between its three branches, subject to such checks as the veto of the President or advice and consent of the Senate; and not to place any given power in two or all three branches of the Government concurrently.

The existence of the same power for the same purposes in both the legislative and executive branches of the Government might lead to most unfortunate results. For instance, if the legislative and executive branches both possessed the power of recognizing the independence of a foreign nation, and one branch should declare it independent while the other denied its independence, then, since they are coördinate, how could the problem be solved by the judicial branch?

The distinction must be borne in mind between the existence of a constitutional power and the existence of an ability to effect certain results. For instance, Congress alone has the power to declare war. The Executive, however, can do many acts which would constitute a *casus belli,* and thus indirectly result in war; but this does not imply in the Executive a concurrent power to declare war, and the war which would result would be one declared by a foreign power. It is possible, even, that the judiciary, by declaring some act of Congress at an inopportune moment to be unconstitutional or otherwise incapable of execution according to its intent, or by

some decision in a prize cause or otherwise, could give rise to a war with a foreign power, yet no one would claim that the judiciary had the power to declare war.

Going yet further even, a State of the Union, although having admittedly no power whatever in foreign relations, may take action uncontrollable by the Federal Government, and which, if not properly a *casus belli*, might nevertheless as a practical matter afford to some foreign nation the excuse of a declaration of war. We may instance the action which might have been taken by the State of Wyoming in relation to the Chinese massacres, or the State of Louisiana in relation to the Italian lynchings, or by the State of New York in its recent controversy with German insurance companies with relation to the treatment of its own insurance companies by Germany.[5]

The necessity of preserving to the President his full constitutional discretion in the conduct of our foreign relations was appreciated from the outset, as is shown by the following record of a speech made in the Senate during its first session, when the bill for establishing the Department of Foreign Affairs was before that body:

The Senate met, and one of the bills for organizing one of the public departments—that of Foreign Affairs—was taken up. After being read, I begged leave of the Chair to submit some general observations, which, though apparently diffuse, I considered as pertinent to the bill before us, the first clause of which was, "There shall be an Executive Department," etc. There are a number of such bills, and may be many more, tending to direct the most minute particle of the President's conduct. If he is to be directed, how he shall do everything, it follows he must do nothing without direction. To what purpose, then, is the executive power lodged with the President,

[5] *Sen. Doc.* 56, 54 Cong., 2 Sess., pp. 4-5. (Cited hereafter as "*Sen. Doc.* 56.")

if he can do nothing without a law directing the mode, manner, and, of course, the thing to be done? May not the two Houses of Congress, on this principle, pass a law depriving him of all powers? You may say it will not get his approbation. But two thirds of both Houses will make it a law without him, and the Constitution is undone at once.

Gentlemen may say, How is the Government then to proceed on these points? The simplest in the world. The President communicates to the Senate that he finds such and such officers necessary in the execution of the Government, and nominates the man. If the Senate approves, they will concur in the measure; if not, refuse their consent, etc., when the appointments are made. The President, in like manner, communicates to the House of Representatives that such appointments have taken place, and require adequate salaries. Then the House of Representatives might show their concurrence or disapprobation, by providing for the officer or not.[6]

Maclay here apparently forgets the power of Congress to pass all laws "necessary and proper" for carrying into execution the power of the other departments: for, in point of fact, the bill to which he objected carefully left the head of the new department, so far as he was made an agency in the conduct of the foreign relations of the United States, subject to the orders of the President. Thus, the officer was to

perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President of the United States, agreeable to the Constitution, relative to correspondence, commissions, or instructions to or with public ministers, or consuls from the United States, or to negotiations with public ministers from foreign States or princes, or to memorials or other applications from foreign public ministers or other foreigners,

[6] *Journal of William Maclay* (N. Y., 1890), pp. 109-10.

or to such other matters respecting foreign affairs *as the President of the United States shall assign to the said Department,* and, furthermore, that the said principal officer shall conduct the business of the said Department in such manner *as the President* of the United States shall from time to time order or instruct.[7]

The act thus offers an interesting contrast to the act establishing the Treasury Department, which Congress regarded as primarily an organ for the carrying out of powers entrusted to it and which, therefore, it made subject to its order.

The discretion of the President within his field as the organ of communication with foreign nations is again emphasized in the following words of Chief Justice Marshall:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases their acts are his acts; and whatever discretion may be used, still there exists, and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights, and, being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is to be communicated. The acts of such an officer, can never be examined by the courts.[8]

[7] 1 Stat. L. 28.

[8] Marbury v. Madison, 1 Cranch 137, 165-6.

But though neither Congress nor the courts may direct the President in the discharge of his constitutional powers, yet either the Senate or the House separately, or both concurrently, may pass resolutions expressive of their desires in relation to questions of an international character, and the President may give such resolutions any weight he chooses, notwithstanding that they have no legal effect. Indeed, it is a part of the President's discretion to pay heed to such resolutions or not, as he elects.

Sometimes, however, Congress or one of the houses has endeavored to go beyond an informal tendering of advice to the President and has sought to force his hand in some matter affecting his foreign policy. A noteworthy instance of this sort occurred in 1826, when opponents of the Panama Congress sought to attach to the appropriation bill for the mission certain conditions to it.[9] Their efforts were frustrated, the principal argument on the constitutional question being that offered by Webster:

> He would recapitulate only his objections to this amendment. It was unprecedented, nothing of the kind having been attempted before. It was, in his opinion, unconstitutional; as it was taking the proper responsibility from the Executive and exercising, ourselves, a power which, from its nature, belongs to the Executive, and not to us. It was prescribing, by the House, the instructions for a Minister abroad. It was nugatory, as it attached conditions which might be complied with, or might not. And lastly, if gentlemen thought it important to express the sense of the House on these subjects, or

[9] Benton's *Abridgment of the Debates of Congress* (cited hereafter as "Benton"), IX, p. 91.

any of them, the regular and customary way was by resolution. At present, it seemed to him that we must make the appropriation without conditions, or refuse it. The President had laid the case before us. If our opinion of the character of the meeting, or its objects, led us to withhold the appropriation, we had the power to do so. If we had not so much confidence in the Executive, as to render us willing to trust to the constitutional exercise of the Executive power, we have power to refuse the money. It is a direct question of aye or no. If the Ministers to be sent to Panama may not be trusted to act, like other Ministers, under the instructions of the Executive, they ought not to go at all.[10]

Another instance of the same character occurred in 1864, when Congress was growing restive at the apparent complacency of the Administration at the progress of French aggressions in Mexico. On April 6 of this year Henry Winter Davis, chairman of the Foreign Affairs Committee of the House, introduced the following resolution:

Resolved, &c., That the Congress of the United States are unwilling, by silence, to leave the nations of the world under the impression that they are indifferent spectators of the deplorable events now transpiring in the Republic of Mexico; and they therefore think fit to declare that it does not accord with the policy of the United States to acknowledge a monarchial government, erected on the ruins of any republican government in America, under the auspices of any European power.[11]

The resolution was passed unanimously, no constitutional question being suggested. Mr. Seward, however, in explaining it to Mr. Dayton, our minister to France, wrote that while "It truly interprets the uni-

[10] *Ib.*, pp. 94-5.

[11] McPherson's *History of the Rebellion,* p. 349.

form sentiment of the people of the United States in reference to Mexico," yet it is

another and distinct question whether the United States would think it necessary or proper to express themselves in the form adopted by the House of Representatives at this time. This is a practical and purely Executive question, and the decision of it constitutionally belongs not to the House of Representatives, nor even to Congress, but to the President of the United States. . . . While the President receives the declaration of the House of Representatives with the profound respect to which it is entitled, as an exposition of its sentiments upon a grave and important subject, he directs that you inform the Government of France that he does not at present contemplate any departure from the policy which this Government has hitherto pursued in regard to the war which exists between France and Mexico. It is hardly necessary to say that the proceeding of the House of Representatives was adopted upon suggestions arising within itself, and not upon any communication of the Executive department; and that the French Government would be seasonably apprised of any change of policy upon this subject which the President might at any future time think it proper to adopt.[12]

This dispatch of Secretary Seward having been communicated by the President to the House at its request, Henry Winter Davis, on June 27, made an elaborate report from the Committee on Foreign Affairs which concluded with the following resolution:

Resolved, That Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters; and it is the constitutional duty of the President to respect that policy, not less in diplomatic negotiations than in the use of the

[12] *Ib.*, pp. 349-50.

national forces when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it; and such proposition while pending and undetermined is not a fit topic of diplomatic explanation with any foreign power.[13]

When this resolution came up for debate, the following December 15, Mr. Blaine protested thus:

To adopt this principle is to start out with a new theory in the administration of our foreign affairs, and I think the House has justified its sense of self-respect and its just appreciation of the spheres of the coordinate departments of government by promptly laying the resolution on the table.[14]

The resolution was then amended by striking out the word "President" and inserting the words "executive departments."[15] It was thereupon passed by an overwhelming vote. All like resolutions introduced into the Senate failed to come to a vote.[16]

Much the same question arose again in 1876, when the Republic of Pretoria (later the Transvaal Republic) sent to Congress its congratulations upon the first centennial of our national independence. Mr. Swann of Maryland, on December 15 of this year, reported from the Committee on Foreign Affairs the following resolution:

Resolved, That the Secretary of State be requested to communicate to the Republic of Pretoria the high appreciation by the House of Representatives of the complimentary terms in which said Republic has referred to

[13] *Ib.*, p. 354.
[14] *Sen. Doc.* 56, p. 47.
[15] *Ib.*
[16] McPherson, p. 349.

the first centennial of our national independence in their resolutions to this House in May last.[17]

On the motion of Mr. Kasson of Iowa, the resolution was amended so as to make it a joint resolution. It was then passed, no constitutional objection being raised; and a similar resolution was at the same time passed in response to congratulations from the Argentine Republic. On January 11, 1877, the two resolutions were reported from the Senate Committee on Foreign Relations and passed the Senate unanimously without debate. On January 26, President Grant vetoed the resolutions on the following grounds:

> Sympathizing as I do in the spirit of courtesy and friendly recognition which has prompted the passage of these resolutions, I can not escape the conviction that their adoption has inadvertently involved the exercise of a power which infringes upon the constitutional rights of the Executive. . . . The Constitution of the United States, following the established usage of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers, and to receive all official communications from them, . . . making him, in the language of one of the most eminent writers on constitutional law, "the constitutional organ of communication with foreign States." If Congress can direct the correspondence of the Secretary of State with foreign Governments, a case very different from that now under consideration might arise, when that officer might be directed to present to the same foreign Government entirely different and antagonistic views or statements.[18]

Inasmuch as the resolutions in question used only

[17] *Sen. Doc.* 56, p. 49.
[18] *Ib.*, p. 48.

the language of a request, it may seem that the President was unduly jealous of his constitutional prerogative. His attitude is probably accounted for by the fact that the resolutions were joint resolutions. This fact brought before him, he evidently believed, the question whether the national legislature had any legislative power in the premises, and this he very warrantably denied.

Still it can hardly be doubted that Congressional resolutions of the sort we have been considering have often furnished the President valuable guidance in the shaping of his foreign policy in conformity with public opinion. Thus the resolutions which were passed by the Senate and House separately in the second session of the Fifty-third Congress, warning the President against the employment of forces to restore the monarchy of Hawaii, probably saved the Administration from a fatal error.[19] Again, the notorious McLemore resolution, requesting the President "to warn all citizens of the United States to refrain from travelling on armed merchant vessels," though ill judged enough as to content, did nevertheless furnish the Administration a valuable hint as to the state of the public mind, and one which it was quick to take.[20] For the Presi-

[19] See *Record,* 53 Cong., 2 Sess., pp. 1814, 1525, 1838, 1879, 1942, 2000, 5127, 5499.

[20] H Res. 147, 64 Cong., 1 Sess. For some protests against the Resolution as an embarrassment to the President and an invasion of his powers, see *Record,* pp. 3700-4. In his letter to Mr. Pou, the President asked for an early vote on the Resolution, in order that "all doubts and conjectures may be swept away, and our foreign relations once more cleared of damaging misunderstandings." These proceedings occurred in March, 1916.

dent, even in the exercise of his most unquestioned powers, cannot act in a vacuum. He must ultimately have the support of public sentiment.

3—First among the constituent powers of the President as the organ of communication with foreign governments is his power to "receive ambassadors and other public ministers."

The first point to be made clear about this phraseology is that, in the words of Attorney-General Cushing, it means "all possible diplomatic agents, which any power may accredit to the United States."[21]

Also as a practical construction of the Constitution, it includes all foreign consular agents, who therefore may not exercise their functions in the United States without an exequatur from the President.[22]

Again, the right to receive ambassadors, ministers, and consuls includes the right to refuse to receive them, to request their recall, to dismiss them, and to determine their eligibility under our laws.[23]

Again, the power of the President to receive is *exclusive*. This was early determined; in connection with which, the following "Minutes of a Conversation" which took place July 10, 1793, between Jefferson, then Secretary of State, and Citizen Genêt, envoy of the first French Republic, is pertinent:

> He asked if they [Congress] were not the sovereign. I told him no, they were sovereign in making laws only, the executive was sovereign in executing them, and the

[21] 7 *Opinions of Attorneys-General*, 209.
[22] J. B. Moore, *Digest*, V, pp. 15-9.
[23] *Ib.*, IV, pp. 473-548; V, pp. 19-32.

judiciary in constructing them where they related to their department. "But," said he, "at least, Congress are bound to see that the treaties are observed." I told him no; there were very few cases indeed arising out of treaties, which they could take notice of; that the President is to see that treaties are observed. "If he decides against the treaty, to whom is a nation to appeal?" I told him the Constitution had made the President the last appeal. He made me a bow, and said, that indeed he would not make me his compliments on such a Constitution, expressed the utmost astonishment at it, and seemed never before to have had such an idea.[24]

A few months later Genêt requested an exequatur for a consul whose commission was addressed to "The Congress of the United States." Jefferson replied that,

as the President was the only channel of communication between the United States and foreign nations, it was from him alone "that foreign nations or their agents are to learn what is or has been the will of the nation"; that whatever he communicated as such, they had a right and were bound to consider "as the expression of the nation"; and that no foreign agent could be "allowed to question it," or "to interpose between him and any other branch of government, under the pretext of either's transgressing their functions." Mr. Jefferson therefore declined to enter into any discussion of the question as to whether it belonged to the President under the Constitution to admit or exclude foreign agents. "I inform you of the fact," he said, "by authority from the President." Mr. Jefferson therefore returned the consul's commission and declared that the President would issue no exequatur to a consul except upon a commission correctly addressed.[25]

[24] *Ib.*, IV, pp. 680-1.
[25] *Ib.*, p. 680.

In the same connection the following circular letter, which was sent out by the Secretary of State in 1833, to the chargés of the United States at various capitals, is interesting:

Sir: It is observed that special communications from foreign powers intended for the Executive of the United States have been usually addressed to the *President and Congress* of the United States.

This style was introduced under the old confederation and was then perfectly proper, but since the Federal Constitution has been formed its inaccuracy is apparent, the whole executive power, particularly that of foreign intercourse, being vested in the President. You will therefore address a note to the minister for foreign affairs, apprising him that all communications made directly to the head of our executive government should be addressed "To the President of the United States of America," without any other addition.

You will, of course, observe that this relates solely to those communications of ceremony which are made from one sovereign to another, for example, notices of births, deaths, changes in government, etc., and does not relate to the ordinary diplomatic intercourse, which is to be carried on as usual through this Department.

I am, respectfully, your obedient servant,

EDWARD LIVINGSTON.[26]

Diplomatic usage is today so well settled in this respect that any departure from it appears most extraordinary. Such an occurrence, which is still fresh in the minds of all, is that referred to by the Secretary of State in the first Lusitania note, in the following terms:

[26] *Sen. Doc.* 56, p. 9, footnote. See also J. Q. Adams, *Memoirs*, IV, pp. 17-8.

There was recently published in the newspapers of the United States, I regret to inform the Imperial German Government, a formal warning, purporting to come from the Imperial German Embassy at Washington, addressed to the people of the United States, and stating, in effect, that any citizen of the United States who exercised his right of free travel upon the seas would do so at his peril if his journey should take him within the zone of waters within which the Imperial German Navy was using submarines against the commerce of Great Britain and France, notwithstanding the respectful but very earnest protest of his Government, the Government of the United States. I do not refer to this for the purpose of calling the attention of the Imperial German Government at this time to the surprising irregularity of a communication from the Imperial German Embassy at Washington addressed to the people of the United States through the newspapers, but only for the purpose of pointing out that no warning that an unlawful and inhumane act will be committed can possibly be accepted as an excuse or palliation for that act or as an abatement of the responsibility for its commission.[27]

4—The second ingredient of the President's power as the organ of communication with foreign states is his power to nominate and, with the advice and consent of the Senate, to appoint "ambassadors, other public ministers, and consuls." With reference to the scope of this power three famous controversies arose early in the history of the country which should be reviewed here briefly.

The first arose over the action of President Madison in appointing, during a recess of the Senate, the commission which negotiated for the United States

[27] Secretary of State Bryan to American Ambassador at Berlin, May 13, 1915.

the Treaty of Ghent. Upon the convening of the Senate a few months later the President sent in his nominations for this commission, which had already gone abroad, for approval by the Senate. Thereupon Senator Gore of Massachusetts offered the following resolutions:

The President of the United States having by the constitution power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session:

Resolved, That in the opinion of the Senate, no such vacancy can happen in any office not before full. . . .

Resolved, That the granting of commissions to Albert Gallatin, John Q. Adams, and James A. Bayard, to be Envoys Extraordinary and Ministers Plenipotentiary, to negotiate and sign a treaty of peace with the United Kingdom of Great Britain and Ireland, during the late recess of the Senate, as in the President's Message to the Senate of the twenty-ninth day of May last, is stated to have been done, was not, in the opinion of the Senate, authorized by the constitution, inasmuch as a vacancy in that office did not happen during such recess of the Senate, and as the Senate had not advised and consented to their appointment.[28]

The two following passages from his speech upon these resolutions makes Senator Gore's position somewhat clearer:

The power of appointment is vested, conjointly in two branches of the Government. A case is described, in which one branch may, under special circumstances, exercise a modified power. What is that case? It is the case of a vacancy in an office, a vacancy of a certain and definitive character, viz: a vacancy that may happen during the recess of the Senate. If the vacancy happen

[28] Benton, V, p. 85.

at another time, it is not the case described by the constitution; for that specifies the precise space of time wherein the vacancy must happen, and the times which define this period bring it emphatically within the ancient and well established maxim: "Expressio unius est exclusio alterius."

It has been suggested, that the President has a right, by the constitution, to create the office of Ambassadors and other public Ministers. An office is created by the constitution, or by some power under it. Prior to its being so created, it does not exist. Whatever power is granted, as regards the appointment of public Ministers, is in that clause which says, "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint." If this, then be the power of creating the office, it must be an actual appointment, and that can be only by the President and Senate. No other authority than what is embraced by these words can be found for the creation of the office of public Minister, and this is not in the President alone, but in the President and Senate. In other words, the appointment makes the office and the appointment cannot be made without the concurrent judgment of these two great organs of the Government.[29]

Senator Gore's position was promptly challenged by Senator Bibb of Georgia, on the following grounds:

The true interpretation of this part of the constitution I take to be this:—that the Executive may fill all offices which from whatever causes happen to be vacant or unoccupied during the recess of the Senate, without regard to the precise period when they became so. The object unquestionably was to avoid inconveniences which might result to the nation from essential offices being vacant; and certainly these inconveniences can neither be increased nor diminished by the fact, that the vacancy did or did not happen while the Senate were in session. But

[29] *Ib.*, pp. 86-7.

I will not take this ground on the present occasion. I will agree with the gentleman from Massachusetts, that the President is not authorized to fill vacancies unless they *happen* during the recess of the Senate; and still deny that the principle assumed in his resolution is deducible from the premises.

I deny that the word "vacancy," in its usual acceptation or in its application to office, implies a previous filling; and I call upon him to produce the authority of any writer who has given such an interpretation to the word. A vacant office is "an office unoccupied," "an office not filled." So soon as an office is created and as long as it exists, it is either vacant or it is full. If it be filled, it is not vacant—if it be not filled, it is vacant; and it is as manifestly vacant if it never has been filled as if the vacancy be created by the death of an incumbent. It is therefore obvious, that, supposing the President incompetent to fill any vacancy, except such as happens in the recess of the Senate, there can be no question concerning the manner in which the vacancy takes place. The only question is, when did it happen? I will state a case, and appeal to the candor of the gentleman for the answer. Suppose an act to be passed during the present session creating an office, and the act to take effect during the recess, if a defined contingency shall happen. The contingency happens, the act begins to operate and the office its existence, during the recess. Is the office from that moment vacant until it is filled? Has the vacancy happened during the recess of the Senate? Is it such a vacancy as may be filled by the President? Sir, there can be but one rational answer. . . .

But, Mr. President, let us examine the particular case which is now made the subject of complaint. In March, 1813, "during the recess of the Senate," the Emperor of Russia offered his mediation for the procurement of peace between the United States and Great Britain. It was promptly accepted by the President, and Ministers were commissioned to meet such as might be appointed on the part of England. They proceeded on their peaceful errand to St. Petersburg, and their nominations were

submitted to the Senate at their next meeting thereafter. Two of the mission were confirmed and one rejected. It is now proposed solemnly to protest against those appointments in the recess, "as an act not authorized by the constitution, and in the performance of which the power of the Senate has been wholly disregarded." Such is the history of the case. Sir, there are two descriptions of offices altogether different in their nature, authorized by the constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other public Ministers, and Consuls. The first description organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon the law, but are the offspring of the state of our relations with foreign nations, and must necessarily be governed by distinct rules. As an independent power, the United States have relations with all other independent powers; and the management of those relations is vested in the Executive. The Ministerial trust confided to our foreign Ministers cannot be considered an "office" in the sense and to the extent which are applicable to internal offices or offices properly so called. But I will use the word in conformity to the resolutions, because I am unwilling to enlarge the limits of the present debate, and because it will enable me to express my ideas upon the subject before us, more intelligibly. I say, then, that whether the office of a Minister exists or does not—how and when it exists, are questions not particularly and precisely settled by the constitution; but that the Executive authority to nominate to the Senate foreign Ministers and Consuls, and to fill vacancies happening during the recess, necessarily includes the power of determining those questions. According to my view of the subject, the office commenced with every independent power from

the moment the United States became independent, and authorized the appointment of foreign Ministers; and it will continue to exist so long as we and they continue independent, unless destroyed by the termination of the relations which created it. The period at which it should be filled is left by the constitution to the discretion of the President. Until he chooses to nominate, there is no power vested in any department to control him, or to appoint. Whether and at what time the office in regard to any foreign nation should be filled, may and generally will depend on accidental circumstances. Hence Congress have always appropriated a gross sum for foreign intercourse, leaving the President to select the powers with whom we should be represented, unrestrained, except by the amount of the appropriation. As the office with reference to any foreign power, is created by, and dependent for its continuance upon the relations subsisting between that power and the United States, its existence and destruction must be contemporaneous with the existence and destruction of those relations. It dies and revives with them. It becomes extinct by war—its revival depends on contingencies, and when revived it is vacant, until it is filled. If the contingencies happen during the recess of the Senate, (of which the President is made sole judge by the provision of the constitution which has been quoted,) he is authorized to appoint. The declaration of war against Great Britain destroyed the office in that country, and its revival depended on subsequent events. If England had immediately thereafter, and during the recess of the Senate, proposed to treat by Ministers for peace, there can be no question that it would have been the constitutional right and the duty of the President to commission persons for that purpose. The mediation of Russia was proposed during the recess. The proposition created a new and necessarily vacant office, and it belonged to the President to determine whether the public interest required that he should fill it. I conclude, therefore, that in this case, the vacancy did "happen during the recess of the Senate," and that the President did not invade the rights of the

Senate in the exercise of his constitutional and exclusive power to "fill up all vacancies which may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."[30]

It is apparent that the two questions at issue in this controversy were: first, as to the meaning of the word "happen" in the clause of the Constitution which provides for recess appointments; second, as to when the office of ambassador or public minister exists, so that appointment may be made to it by the appointing power. On the first point Senator Gore's position was the older one, the one held by Washington.[31] But the position taken by Senator Bibb is the one that is today securely established by numerous opinions of Attorneys-General and by a host of precedents: a vacancy *happens* during the recess of the Senate if, for any reason, it *happens then to exist.*[32]

As to the second point, Senator Bibb's views reduce to these propositions: the office of ambassador or public minister exists by the Constitution when the international relationship exists which such office is calculated to serve; it becomes vacant when an exigency occurs requiring it to be filled; and of such exigency the President is the sole judge. These views seem to have prevailed, at least till recent years. In the words of Attorney-General Cushing,

[30] *Ib.*, pp. 90-1. See also *Letters and Other Writings of James Madison* (Phila., 1867), III, 350-3, 369-71.

[31] See *Exec. Journals of the Senate,* I, pp. 236 and 389; II, pp. 9 and 76.

[32] 1 *Opinions* 631, 2 *ib.* 525, 3 *ib.* 673, 4 *ib.* 523, 7 *ib.* 223, 10 *ib.* 357, 11 *lb.* 179, 12 *ib.* 32, 19 *ib.* 261.

written in 1855: "This power to appoint diplomatic agents . . . according to his judgment of the public service is a constitutional function of the President, . . . requiring only the ultimate concurrence of the Senate." The designation of the officer is "derived from the Law of Nations, and the authority to appoint from the Constitution."[33]

The second controversy above referred to arose when, on December 26, 1825, President Adams sent to the Senate the names of three men "to be envoys extraordinary and ministers plenipotentiary to the Assembly of American Nations at Panama." The point raised with reference to these nominations was that they were to offices unknown to the Constitution, and hence that appointment to them would be an excess of the power of the President and Senate. Said Senator Benton:

> The Ambassadors and Ministers here intended, [that is by the Constitution] are such only as are known to the law of nations. Their names, grades, rights, privileges, and immunities, are perfectly defined in the books which treat of them, and were thoroughly understood by the framers of our constitution. They are, Ambassadors —Envoys—Envoys Extraordinary—Ministers—Ministers Plenipotentiary—Ministers Resident. . . .
>
> Tried by these tests, and the diplomatic qualities of our intended Ministers fail at every attribute of the character. Spite of the names which are imposed upon them, they turn out to be a sort of Deputies with full powers for undefinable objects. They are unknown to the law of nations, unknown to our constitution; and the combined powers of the Federal Government are incompetent to create them. Nothing less than an original act,

[33] 7 *ib.* 193-4.

from the people of the States, in their sovereign capacity, is equal to the task. Had these gentlemen been nominated to us as DEPUTIES to a CONGRESS, would not the nominations have been instantly and unanimously rejected? And shall their fate be different under a different name? The delicacy of this position was seen and felt by the Administration. The terms "Deputy," and "Commissioner," were used in the official correspondence up to near the date of the nomination, but as these names could not pass the Senate, a resort to others became indispensable. The invitations and acceptance were in express terms, for *"Deputies and Representatives to a* CONGRESS." The nominations to the Senate are wholly different.[34]

Senator Benton's views did not prevail, as the nominations were eventually ratified. The established view is clearly that the term "ambassadors and other public ministers," which occurs three times in the Constitution, comprehends "all officers having diplomatic functions, whatever their title or designation." As Attorney-General Cushing put the matter in the opinion already cited:

The modern law of nations recognises a class of public officers, who, while bearing various designations, which are chiefly significant, in the relation of rank, precedence, or dignity, possesses in substance the same functions, rights, and privileges, being agents of their respective governments for the transaction of its diplomatic business abroad, possessing such powers as their respective governments may please to confer, and enjoying, as a class, established legal rights and immunities of person and property in the governments to which they are accredited as the representatives of sovereign powers. . . .

With diplomatic agents thus existing as a class, of recognised legal rights, but of irregular and vague di-

[34] Benton, VIII, pp. 463-4.

versities of title and of power, the Constitution of the United States intervenes to lay the foundation of their appointment under this Government, in these words:

"The President . . . shall have power, by and with the advice and consent of the Senate," &c.[35]

The third controversy above referred to arose in 1831 in consequence of the failure of President Jackson to send to the Senate for confirmation the names of three men whom he had dispatched some months before on a special mission to Turkey. Said Senator Tazewell of Virginia, who led the attack on the President's course:

I beg the Senate to bear in mind that this authority was not conferred upon these persons by any private letter or warrant written by a Secretary, and intended for their own guidance and governance merely; but that it purports to be granted by the Chief Magistrate himself, is communicated to them by letters patent, under his own signature, authenticated by the great seal of the United States, addressed to all whom they might concern, designed to be exhibited to the inspection of a foreign sovereign, and to be exchanged against similar powers to be granted by him to others who might equally possess his confidence. To whomsoever this seal was shown, it proved itself. When recognized by any sovereign, it entitled those who bore the commission it authenticated, to all the rights, privileges, and immunities accorded to the ministers of any potentate on earth; and authorized them to pledge the faith and honor of this nation to the performance of any act within the scope of the full power it purported to bestow. This is the character of the commission granted by the President upon the present occasion, a copy of which is now upon our files.[36]

[35] 7 *Opinions* 190, 192-3.

[36] Benton, XI, p. 197.

The Senator then propounded two questions; first:

Did the President possess any authority to institute such an original mission during the recess, and without the advice and consent of the Senate? And if he did, was it not his bounden duty to have nominated to the Senate at their next session the persons he had so appointed during the recess?[37]

On the second question he proceeded thus:

Mr. President, whatever may be the opinion of some as to the inherent powers supposed to be enjoyed by this body, or some other departments of this Government, I think we must all agree that the Executive has no such inherent or undefined authority. All his powers must be derived under some express grant contained in the constitution. Inherent power in him would be but a courtly term to denote prerogative; and the exercise of any ungranted authority by him is nothing else than mere usurpation. Let us then turn to the charter, and see if that contains the concession of any such power as has been here exerted.

It is true that the first section of the second article of the Constitution vests in the President "the Executive power"; and equally true that the power which has been exercised upon this occasion, is properly an Executive power. Therefore, if there was no other provision in the constitution upon the subject than this, no doubt would exist that the President was authorized to do that which he has done. But the constitution does not stop here. Very soon after this general grant of the Executive power, and in the next section of the same article which contains the grant, the constitution proceeds to check and restrain the power so granted, by prescribing the manner in which alone the President must exercise it. Thus, in the second paragraph of the second section of this same second article, it declares that "he shall have power, by and with the advice of the Senate, to

[37] *Ib.*

make treaties, provided two-thirds of the Senators present concur"; and then, that "he shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court; and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." Hence, it is obvious, that, although the Executive power is vested in the President alone, he is expressly inhibited from making treaties, (if indeed that is an Executive power,) or appointment to any office of the United States, (which certainly is such,) without the advice and consent of the Senate. But the officers in question never have been nominated to the Senate, nor has this body advised or consented to their appointment in any way; therefore, the act of the President in conferring these appointments without the concurrence of the Senate can derive no sanction or support from this part of the constitution.[38]

Later, however, the Senator made the following important admission:

Let me not be misunderstood. I do not mean to doubt the power of the President to appoint secret agents when and how he pleases; nor do I mean to advance any claim on the part of the Senate to participate in the exercise of any such power. As a simple individual, I would humbly suggest to him, if I might be permitted so to do, that whenever he stands in need of secret agents who are really designed to be such, he had better abstain from putting his own name to the warrant given to them, and never permit it to be authenticated by the great seal. Such a proceeding may sometimes prove hazardous, and I think would not be very creditable to the nation whose seal it is. But as a Senator, I do claim for the Senate, in the language of the constitution, the right of advising and consenting to the appointment of any and every officer of the United States, no matter what may be his

[38] *Ib.*, pp. 198-8.

name, what his duties, or how he may be instructed to perform them. And it is only because secret agents are not officers of the United States, but the mere agents of the President, or of his Secretaries, or of his military or naval commanders, that I disclaim all participation in their appointment.[39]

This admission was held to furnish adequate ground for the justification of the President. The error of those who attack the Turkish mission, said Livingston, consists in giving to those commissioners the appellation of public Ministers, and thus bringing them within the proviso of the constitution, which directs that such officers shall be appointed with the advice and consent of the Senate.[40]

He then continued:

The distinction that was made by the Senator from Illinois, and supported by a reference to high authority on the law of nations, did not make upon the gentleman from Virginia the impression it seemed to do upon the rest of the Senate. It is a well founded distinction, that which he thus urged, between a public Minister and a secret agent. It seems to be thought that the nature and style of the mission is to be determined by the manner in which the powers are authenticated—not by the character given in those powers. Sir, there are grades in diplomacy which give different ranks and privileges—from an ambassador to a secret agent. The lowest of these may have, for the purpose of binding the party he represents, the same powers that are usually vested in the highest. . . .

Ambassadors and other public Ministers are directed to be appointed by the President, by and with the advice and consent of the Senate; because public missions re-

[39] *Ib.*, p. 207.

[40] *Ib.*, p. 220.

quired no secrecy, although their instructions might. But the framers of the constitution knew the necessity of missions, of which not only the object but the existence should be kept secret. They therefore wisely made the co-operation of the Senate ultimately necessary in the first instance, but left the appointment solely to the President in the last. . . .

The practice of appointing secret agents is coeval with our existence as a nation, and goes beyond our acknowledgement as such by other powers. All those great men who have figured in the history of our diplomacy, began their career, and performed some of their most important services in the capacity of secret agents, with full powers. Franklin, Adams, Lee, were only commissioners; and in negotiating a treaty with the Emperor of Morocco, the selection of the secret agent was left to the Ministers appointed to make the treaty: and, accordingly, in the year 1785, Mr. Adams and Mr. Jefferson appointed Thomas Barclay, who went to Morocco and made a treaty, which was ratified by the Ministers at Paris.

These instances show that, even prior to the establishment of the Federal Government, secret plenipotentiaries were known, as well in the practice of our own country as in the general law of nations: and that these secret agents were not on a level with messengers, letter-carriers, or spies, to whom it has been found necessary in argument to assimilate them. On the 30th March, 1795, in the recess of the Senate, by letters patent under the great broad seal of the United States, and the signature of their President, (that President being George Washington,) countersigned by the Secretary of State, David Humphreys was appointed commissioner plenipotentiary for negotiating a treaty of peace with Algiers. By instructions from the President, he was afterwards authorized to employ Joseph Donaldson as agent in that business. In May, of the same year, he did appoint Donaldson, who went to Algiers, and in September of the same year concluded a treaty with the Dey and Divan, which was confirmed by Humphreys, at Lisbon, on the 28th November in the same year, and afterwards ratified by the

Senate on the —— day of ——, 1796, and an act passed both Houses on 6th May, 1796, appropriating a large sum, twenty-five thousand dollars annually, for carrying it into effect.

I call the attention of the Senate to all the facts of this case, with the previous remark, that the construction which it gives to the constitution was made in the earliest years of the Federal Government, by the man who presided in the convention which made that constitution, acting with the advice and assistance of the leading members of that body, all fresh from its discussion; men who had taken prominent parts in every question that arose. That in the Senate which ratified it, and in the House of Representatives which carried it into execution, were several members, not only of the convention when it was formed, but of the State assemblies where it was discussed, analyzed, every hidden defect brought to light; every possible inconvenience predicted; every construction given that ingenuity, sharpened by opposition and party feeling, could conceive; where amendments were proposed, to remedy apprehended evil; where it was examined, article by article, phrase by phrase, not a word, not a syllable, escaping their inquisitorial scrutiny. Yet, by those men, with this perfect and recent knowledge of the constitution, acting under the solemn obligation to preserve it inviolate, and without any possible motive to make them forget their duty, was this first precedent set; without a single doubt on the mind that it was correct; without protest, without even remark. A precedent going the full length of that which is now unhesitatingly called a lawless, unconstitutional usurpation; bearing the present act out in all its parts, and in some points going much beyond it.[41]

The precedent afforded by Humphreys's appointment without reference to the Senate has since been multiplied many times. Notable instances of the same sort were the mission of A. Dudley Mann to Hanover

[41] *Ib.*, pp. 221-2.

and other German states in 1846, of the same gentleman to Hungary in 1849, of Nicholas Trist to Mexico in 1848, of Commodore Perry to Japan in 1852, of J. H. Blount to Hawaii in 1893.[42] The last named case is the extremest of all. Blount, who was appointed while the Senate was in session, was given "paramount authority" over the American resident minister at Hawaii and was further empowered to employ the military and naval forces of the United States, if necessary to protect American lives and interests. His mission raised a vigorous storm of protest in the Senate, but the majority report of the committee which was created to investigate the constitutional question vindicated the President in the following terms:

> A question has been made as to the right of the President of the United States to dispatch Mr. Blount to Hawaii as his personal representative for the purpose of seeking the further information which the President believed was necessary in order to arrive at a just conclusion regarding the state of affairs in Hawaii. Many precedents could be quoted to show that such power has been exercised by the President on various occasions, without dissent on the part of Congress. These precedents also show that the Senate of the United States, though in session, need not be consulted as to the appointment of such agents.[43]

More recently, President Wilson's fondness for sending agents abroad without consulting the Senate as to their appointment has provoked criticism, but, it

[42] *Sen. Misc. Doc.* 109, 50 Cong., 1 Sess.

[43] See *Record*, 53 Cong., 2 Sess., pp. 127, 132, 196-7, 199, 205, 431-2.

would appear, without good reason from the point of view of precedent. At the same time, it is difficult to harmonize the practice, considering the dimensions it has today attained, with a reasonable construction of the Constitution. Such agents have been justified as "secret agents," yet neither their existence nor their mission is invariably secret. They have been called "private agents of the President," his "personal representatives," yet they have been sometimes commissioned under the great seal. They have been justified as organs of negotiation and so as springing from the Executive's power in negotiating treaties, yet this is also a normal function of our regular representatives. They have been considered as agents appointed for special occasions, but, as we have seen, the term "public ministers" of the Constitution is broad enough to include all categories of diplomatic agents. Theoretically, perhaps, they could not claim full diplomatic privileges abroad, yet practically, if their identity were known, they would probably be accorded them.

In short, the only test which is generally available for distinguishing this kind of agents from the other kind is to be found in the method of their appointment and in the fact that they are usually paid out of the "contingent fund."[44] In no other way has the notion

[44] See generally John W. Foster, *The Practice of Diplomacy*, ch. X.—A question somewhat related to the one just under discussion arises under Art. I, Sec. 6, Par. 2, of the Constitution, which provides that "no Senator or Representative shall . . . be appointed to any civil office under the authority of the United States, which shall have been created" during his term; and no officer of the United States "shall be a member of either house

of the President's prerogative in the field of foreign relations asserted itself more strikingly.

But "the balance of the Constitution" has a way of asserting itself, and in another respect the President has apparently lost authority touching diplomatic appointments. I refer to such legislation as that represented by the Acts of March 3, 1893, and of March 2, 1909, the former of which purported to "authorize" the President to appoint "ambassadors" in certain cases, and the latter of which, in repealing the earlier act, ordains in effect that new ambassadorships may be created only with the consent of Congress.[45] The question is: What effect may validly be given such legislation?

During the first sixty-five years of the Government Congress passed no act purporting to create any diplomatic rank, the entire question of grades being left

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during his continuance in office." Notwithstanding this provision, the President has frequently appointed members of the houses as commissioners to negotiate treaties and agreements with foreign governments. The Treaty of Peace with Spain, the treaty to settle the Behring Sea controversy, the treaty establishing the boundary line between Canada and Alaska, were negotiated by commissions containing Senators and Representatives. See the late Senator Hoar's *Autobiography,* II, 48-51, where a protest is registered against this practice. Such appointments, however, usually lack the prime tests of "office," as these are laid down by the Court: "tenure, duration, emolument and duties." They are "transient, occasional, incidental." See Willoughby's *Constitution,* I, 528-9; also U. S. v. Hartwell, 6 Wallace 385. Perhaps it may be held on this basis that "special agents," of the sort discussed in the text, are not only not *"public* ministers," but that they are not "officers" at all.

[45] See 27 Stat. L. 497, and 32 *ib.* 672.

with the President. Indeed, during the administrations of Washington, Adams and Jefferson, and the first term of Madison, no mention occurs in any appropriation act even, of ministers of a specified rank at this or that place, but the provision for the diplomatic corps consisted of so much money "for the expenses of foreign intercourse," to be expended at the discretion of the President. In Madison's second term the practice was introduced of allocating special sums to the several foreign missions maintained by the Government, but even then the legislative provisions did not purport to curtail the discretion of the President in any way in the choice of diplomatic agents, and far less did they raise any implication of a claim of power by Congress to create offices to which, by the terms of the Constitution, he may nominate and, with the advice and consent of the Senate, appoint "ambassadors and other public ministers."[46]

The earliest and the principal precedent for the Acts of 1893 and 1909, referred to above, is the Act of March 1, 1855. This act provided in its opening section that "from and after the 30th day of June, next, the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary," with a specified annual compensation for each, "to the following countries," &c. In the body of the act was also this provision: "The President shall appoint no other than citizens of the United States, who are residents thereof, or abroad

[46] See 7 *Opinions of Attorneys-General*, 186 ff.

in the employment of the Government at the time of their appointment."[47]

The question of the interpretation of the act having been referred to the Attorney-General, he held that the provisions quoted, and all like provisions in the act, "must be deemed directory or recommendatory only, and not mandatory." For, he continued, with special reference to the provision about the appointment of citizens:

> The limit of the range of selection for the appointment of constitutional officers depends on the Constitution. Congress may refuse to make appropriations to pay a person unless appointed from this or that category; but the President may, in my judgment, employ him, if the public interest requires it, whether he be a citizen or not, and whether or not at the time of the appointment he be actually within the United States.

And similarly as to the word "shall" in the opening section of the act—this, the Attorney-General held, must be construed to signify "may":

> For Congress cannot by law constitutionally require the President to make removals or appointments of public ministers on a given day, or to make such appointments of prescribed rank, or to make or not make them at this or that place. He, with the advice of the Senate, enters into treaties; he, with the advice of the Senate, appoints ambassadors and other public ministers. It is a constitutional power to appoint to a constitutional office, not a statute power nor a statute office. Like the power to pardon, it is not limitable by Congress; which can as well say that the President *shall* pardon all offences of a certain denomination and no others, as to say that he *shall* appoint "public ministers" of the grade of "envoy

[47] *Ib.*, pp. 214-5.

extraordinary" and no others. He may, with the advice of the Senate, appoint an ambassador, a commissioner plenipotentiary, a minister resident, a chargé d'affaires, a special agent, a secretary of embassy, a secretary of minister plenipotentiary, notwithstanding the language of this act, just as, in past times, he appointed a minister resident, a chargé d'affaires, a commissioner plenipotentiary, without, nay, in seeming contradiction with, authorizing provisions of acts of Congress. And, as we are not by construction to assume that a legislative act intends any unconstitutional thing when its words can be so construed as to mean a constitutional thing, we are therefore not to read this act as requiring the President to appoint and maintain a minister of the rank of envoy extraordinary at the courts of London, Paris, St. Petersburg, Madrid, Mexico, Copenhagen, regardless of what may, in his judgment and that of the Senate, be the necessities or interests of the public service; nor to read it as forbidding him to have either of those legations, or any other, in the hands of a mere chargé d'affaires.

The total effect of the act, the Attorney-General concluded, was simply this: It was

to say, that if, and whenever, the President shall, by and with the advice and consent of the Senate, appoint an envoy extraordinary and minister plenipotentiary to Great Britain, or to Sweden, the compensation of that minister shall be so much and no more. It could not constitutionally say, and does not pretend to say, that if, under any contingencies of political relation, it should become not possible, not honorable, not expedient for the United States to have such a minister of the highest rank in Great Britain or in Sweden, and still the public honor and interests required the legation to be maintained, that it might not be done by means of a minister of secondary rank, a minister resident, a chargé d'affaires, or even an agent without title. It does not pretend to say that the President must, contrary to the judgment of himself and of the Senate, appoint a minister of the highest rank at every court of Europe or America.

In regard to all the possible varieties of diplomatic functionaries of the Government, the act leaves them where they stood before, in respect to their relation to the appointing power of the President.[48]

If this reasoning is convincing, then a like operation should be given to the Act of 1909; that is to say, it should be regarded merely as a notification from the Congress which passed it that it would appropriate no money for the salaries of new ambassadorships, a notification which succeeding Congresses would naturally be under no obligation to heed, since Congress can limit its own discretion as little as it can the President's. Moreover, the same reasoning would apply to consuls, for they are officers created by the Constitution and the Law of Nations. On the other hand, the *duties* of consular agents are derived only in small part from the Law of Nations; in much greater part they spring from treaties, while Congress, by virtue of its powers to regulate commerce, may also cast certain duties upon them. Also, it has been held, the lower grades of consular agents are "inferior officers," whose appointment may be vested in the President alone.[49]

[48] *Ib.*, pp. 215-20, *passim.*

[49] 7 *Opins.* 242 ff., also by Attorney-General Cushing. In U. S. v. Eaton, 169 U. S. 343, it was held that statutory provisions as to bonds of consuls are "directory," not "mandatory," —a result in harmony with Cushing's reasoning. The same case also sustains the proposition that vice-consuls are "inferior officers." The Act of August 18, 1866 (11 Stat. L. 139) required consuls and commercial agents to collect commercial information, etc. The Act of April 5, 1906 (34 Stat. L. 99) reorganizes the consular system. The Act of February 5, 1915 (38 Stat. L.

5—In consequence of his power to receive and dispatch diplomatic agents the President has the power to recognize new states, communities claiming the status of belligerency, and changes of government in established states. In consequence of its participation in the appointment of ambassadors and public ministers the Senate frequently shares this power of recognition.

These propositions are secure enough; but the question remains whether Congress enjoys an independent power of recognition. The precedents in the matter are succinctly summarized by John Bassett Moore in his "Digest," thus:

In the preceding review [Ib., I, pp. 67-243] of the recognition, respectively, of new states, new governments, and belligerency, there has been made in each

805) requires that all appointments of secretaries in the diplomatic service and of consuls-general and consuls shall be by commission to the officers, and not by commission to a particular post; and that the officers shall be subject to assignment to posts and transferred from one post to another by order of the President as the interests of the service may require. Some recent acts touching grades of diplomatic agents are the following: the Act of December 6, 1913, "authorizing" the President to appoint envoys extraordinary and ministers plenipotentiary to Paraguay and Uruguay; the Act of September 4, 1913, "authorizing" the President to appoint an ambassador to Spain, with salary at 17,500 dollars per annum; the Act of May 16, 1914, "authorizing" ambassadors to Argentina and Chile, with like salary. As this volume was going to press, the Root Mission was leaving for Petrograd (May, 1917). I am informed that Mr. Root bore "the rank of ambassador" and some of his associates "the rank of envoy extraordinary," and that their names were not referred to the Senate. Neither was the mission authorized by an act of Congress.

case, a precise statement of facts, showing how and by whom the recognition was accorded. In every case, as it appears, of a new government and of belligerency, the question of recognition was determined solely by the Executive. In the case of the Spanish-American republics, of Texas, of Hayti, and of Liberia, the President, before recognizing the new state, invoked the judgment and cooperation of Congress; and in each of these cases provision was made for the appointment of a minister, which, when made in due form, constitutes, as has been seen, according to the rules of international law, a formal recognition. In numerous other cases, the recognition was given by the Executive solely on his own responsibility.[50]

But this statement still leaves open the question just put, whether Congress has a concurrent power of recognition. "The question of the power to recognize," Moore continues, "has been specifically discussed on various occasions." He then cites a passage from John Quincy Adams's "Memoirs," recording a discussion which took place in Monroe's Cabinet on January 1, 1819, with reference to a draft instruction by Adams, then Secretary of State, to the American minister at the Court of St. James's announcing the President's immediate intention of recognizing the government of Buenos Ayres:

A question arose as to the form of recognition. Mr. Crawford said that if an acknowledgment was to take place he should prefer to make it, not by granting an exequatur to a consul, but by sending a minister there, because the Senate must then act upon the nomination, which would give their sanction to the measure. Mr. Wirt added that the House of Representatives must also concur by assenting to an act of appropriation. The

[50] *Op. cit.*, I, pp. 243-4.

President, laughing, said that as those bodies had the power of impeachment it would be convenient to have them thus pledged beforehand. Mr. Adams observed that his "impressions were altogether different. I thought it not consistent with our national dignity," said Mr. Adams, "to be the first in sending a minister to a new power. It had not been done by any European power to ourselves. . . . As to impeachment, I was willing to take my share of risk of it for this measure whenever the Executive should deem it proper. And, instead of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was, I had no doubt, by our Constitution an act of the Executive authority. General Washington had exercised it in recognizing the French Republic by the reception of Mr. Genest. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform.

"Mr. Crawford said he did not think there was anything in the objection to sending a minister on the score of national dignity, and that there was a difference between the recognition of a change of government in a nation already acknowledged as sovereign, and the recognition of a new nation itself. He did not, however, deny, but admitted, that the recognition was strictly within the powers of the Executive alone, and I did not press the discussion further."[51]

Somewhat earlier there had been a debate on the same subject in the House, occasioned by the effort of Clay, on March 24, 1818, to secure an appropriation of $18,000 to provide the outfit and salary of a min-

[51] *Ib.*, citing Adams's *Memoirs*, IV, pp. 205-6.

ister from the United States to the "independent provinces of the River Plata in South America." Significantly, Clay had hardly offered his measure when he changed it to the following form:

> For one year's salary, and an outfit to a Minister to the United Provinces of the Rio de La Plata, the salary to commence, and the outfit to be paid, whenever the President shall deem it expedient to send a Minister to the said United Provinces, a sum not exceeding eighteen thousand dollars.[52]

In this form, he contended, the House might express its sentiments "without unconstitutional interference with the Executive."

Nevertheless, the measure was attacked as "an act of usurpation, an invasion of executive authority." "The Constitution," said Smyth of Virginia, who among others advanced this position,

> grants to the President, by and with the consent of the Senate, power to appoint Ambassadors and public Ministers, and to make treaties. According to the usage of the Government, it is the President who receives all foreign Ministers, and determines what foreign Ministers shall or shall not be received. It is by the exercise of some one of these powers, in neither of which has this House any participation, that a foreign power must be acknowledged. Then the acknowledgment of the independence of a new power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation.[53]

The ablest defence of the measure was made by Tucker of the same State, who on the constitutional question spoke as follows:

[52] Benton, VI, p. 145.
[53] *Ib.*, p. 162.

But, gentlemen seem to consider this an interference with the constitutional powers of the Executive. I do not think so. This House has at all times, and on all subjects, a right to declare its opinions, leaving it to the Executive to act upon them or not, according to its pleasure. Nay, it has often done more. Wherever the act to be done by the Executive has been intimately connected with the constitutional powers of this body, it has always deemed itself competent to act. Thus, before the treaty for the purchase of Louisiana was made, $2,000,000 were put at the disposal of the Government for a purchase of Southern territory. Here there was an act perfectly analogous. This body had no right to make a purchase, or to command the President to do so; but, as the purchase, if made, would have called upon the legislative body for an appropriation, it was thought advisable to make it beforehand, and thus indicate a correspondence of views on the subject, where correspondence was necessary. Could it have been said at this time, that the Executive were censured by Congress for delaying to make a purchase the interest of the nation called for? Could it then have been objected that we were trenching upon the constitutional powers of the Executive? Could it have been alleged to be useless and frivolous, because the Executive could make the purchase without a law? If not, neither can it be said now. The act of the Executive *there* would only have called for a small appropriation. The act of this Executive *here* might have the effect of a declaration of war, which it is within the constitutional powers of the legislative body alone to make. It would appear to me indeed of the utmost importance, that this correspondence of views should be preserved between these two branches of the Government. How embarrassing to the Executive must it be, if, after a treaty has been made calling for a large appropriation, this body should refuse to make it, and to sanction a contract entered into with a foreign State. How much more embarrassing if, in the exercise of its constitutional powers, the Executive should involve the nation in a war against the wishes of its Representatives.

The jarring and confusion and inefficiency that would result, might have the most fatal influence on the national success. No, sir, frankness and candor, and a free and unreserved communication of the feelings and opinions of each by the other, can never have any other than the happiest influence upon the National Councils.[54]

Thus Tucker, who was the best authority in the House on such questions, did not claim for Congress a power to recognize new states, but based his whole argument upon the desirability of cooperation between the Executive and the legislature in the exercise of their respective powers. The only speaker who seems to have made such a claim on this occasion was Clay himself, in the following terms:

There are three modes under our Constitution in which a nation may be recognized: By the Executive receiving a minister; secondly, by its sending one thither; and, thirdly, this House unquestionably has the right to recognize in the exercise of the constitutional power of Congress to regulate foreign commerce. To receive a minister from a foreign power is an admission that the party sending him is sovereign and independent. So the sending a minister, as ministers are never sent but to sovereign powers, is a recognition of the independence of the power to whom the minister is sent. . . . This House, Mr. C. said, had the incontestable right to recognize a foreign nation in the exercise of its power to regulate commerce with foreign nations. Suppose, for example, we passed an act to regulate trade between the United States and Buenos Ayres; the existence of the nation would be thereby recognized, as we could not regulate trade with a nation which does not exist.[55]

Clay's measure was defeated by a vote of 45 to 115.

[54] *Ib.*, p. 168.

[55] *Sen. Doc.* 56, p. 32. See also *ib.*, pp. 33-7.

Yet four years later Congress passed an appropriation of $100,000 for "such missions to the *independent* nations of the American continent as the President of the United States may deem proper." This may seem to be a claim of power on the part of Congress itself. But, as has already been stated, Congress was acting on this occasion on the invitation of the President.

And so again Congress acted in connection with the recognition of Texas in 1836. In his message of December 21 of that year, President Jackson said:

No steps have been taken by the Executive toward the acknowledgment of the independence of Texas, and the whole subject would have been left without further remark on the information now given to Congress were it not that the two Houses at their last session, acting separately, passed resolutions "that the independence of Texas ought to be acknowledged by the United States whenever satisfactory information should be received that it had in successful operation a civil government capable of performing the duties and fulfilling the obligations of an independent power." This mark of interest in the question of the independence of Texas and indication of the views of Congress make it proper that I should somewhat in detail present the considerations that have governed the Executive in continuing to occupy the ground previously taken in the contest between Mexico and Texas. . . .

In the preamble to the resolutions of the House of Representatives it is distinctly intimated that the expediency of recognizing the independence of Texas should be left to the decision of Congress. In this view, on the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over

the subject. It is to be presumed that on no future occasion will a dispute arise, as none has heretofore occurred, between the Executive and Legislature in the exercise of the power of recognition. It will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war can alone be declared, and by whom all the provisions for sustaining its perils must be furnished. Its submission to Congress, which represents in one of its branches the States of this Union and in the other the people of the United States, where there may be reasonable ground to apprehend so grave a consequence, would certainly afford the fullest satisfaction to our own country and a perfect guaranty to all other nations of the justice and prudence of the measures which might be adopted.[56]

On the following February 27 a motion was made in the House to amend the Civil and Diplomatic Appropriations bill by inserting the following provision:

For an outfit and salary of a diplomatic agent to be sent to the *independent* republic of Texas ——— thousand dollars.[57]

Speaking for this amendment, John Quincy Adams offered the objection,

that the act of recognition of a foreign power had *heretofore always* been an executive act of this Government. It was the business and duty of the President of the United States, and he [Mr. A.] was not willing to set the example of giving that recognition on the part of the legislative body without recommendation of the Executive.[58]

[56] Richardson, *Messages and Papers of the Presidents* (cited hereafter as "Richardson"), III, pp. 266-7.

[57] *Sen. Doc.* 56, p. 43.

[58] *Ib.*

Eventually the word "independent" was stricken out of the amendment and the following clause was added:

> Whenever the President of the United States shall receive satisfactory evidence that Texas is an independent Power, and that it is expedient to appoint such a minister.[59]

The question of Congress's right to recognize new states was prominently raised in more recent years in connection with Cuba's final and successful struggle for independence. Beset by numerous legislative proposals of a more or less mandatory character, urging recognition upon the President, the Senate Foreign Relations Committee, in 1897, made an elaborate investigation of the whole subject and came to the following conclusions as to this power:

> The "recognition" of independence or belligerency of a foreign power, technically speaking, is distinctly a diplomatic matter. It is properly evidenced either by sending a public minister to the Government thus recognized, or by receiving a public minister therefrom. The latter is the usual and proper course. Diplomatic relations with a new power are properly, and customarily inaugurated at the request of that power, expressed through an envoy sent for the purpose. The reception of this envoy, as pointed out, is the act of the President alone. The next step, that of sending a public minister to the nation thus recognized, is primarily the act of the President. The Senate can take no part in it at all, until the President has sent in a nomination. Then it acts in its executive capacity, and, customarily, in "executive session." The legislative branch of the Government can exercise no influence over this step except, very indirectly, by withholding appropriations. . . .
>
> Nor can the legislative branch of the Government hold

[59] *Ib.*

any communications with foreign powers. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity. . . .

Congress can help the Cuban insurgents by legislation in many ways, but it cannot help them legitimately by mere declarations, or by attempts to engage in diplomatic negotiations, if our interpretation of the Constitution is correct. That it is correct . . . [is] shown by the opinions of jurists and statesmen of the past.[60]

Notwithstanding the flavor of finality which attaches to this statement, when a few months later President McKinley proposed intervention in Cuba, the whole question was reopened. The President, it appears, was opposed to recognizing the Cuban insurgent government, and a strong majority of the Foreign Relations Committee was in agreement with him on this point. A minority of the committee, on the contrary, favored "the immediate recognition of the Republic of Cuba . . . as a free, independent, and sovereign power." This view finally prevailed, for the opening resolution of the measure which empowered the President to employ the land and naval forces of the United States to expel Spain from Cuba declared that the people of that island "are and of right ought to be free and independent."

However, I think it extremely doubtful whether this declaration, considered in the light of the discussion

[60] *Ib.*, pp. 20-22.

which attended its adoption, is to be regarded as a claim by Congress to the power of recognition. It is true that Senator Spooner of Wisconsin attacked the declaration as a usurpation of "an executive function" and as an attempt "to make a precedent which ought not . . . to be established";[61] but the answers that were returned by the defenders of the resolution on the constitutional issue were most various. Two Senators, one of whom quoted "Helvidius," denied that recognition was exclusively an executive function. Two others, on the contrary, admitted this, but professed themselves careless on that point. For the most part, the sponsors of the declaration pursued the following line of reasoning: Diplomacy, they said, was now at an end and the President himself had appealed to Congress to provide a solution for the Cuban situation. In response Congress was about to exercise its constitutional power of declaring war, and it had consequently the right to state the purpose of the war which it was about to declare. Said Senator Morgan of Alabama:

> I understand that declaration to be not a historical declaration of the existing facts or situation, but it is a high political decree, such a decree, for instance, as we put in our party platforms—a basis of political action, not as something already accomplished, but something that is to be accomplished—that being their right, that being the ground of their unification in achieving and accomplishing that right. That is the way I understand it.[62]

[61] *Record*, 55 Cong., 2 Sess., Append., p. 290.
[62] *Ib.*, p. 290.

Or, as Senator Nelson of Minnesota put it:

> The President has asked us to give him the right to make war to expel the Spaniards from Cuba. He has asked us to put that power in his hands; and when we are asked to grant that power—the highest power given under the Constitution—we have the right, the intrinsic right, vested in us by the Constitution, to say how and under what conditions and with what allies that war-making power shall be exercised.[63]

Recognition, as it is known to International Law, belongs, it seems clear, to the President alone, or to the President in conjunction with the Senate. This is certainly the verdict which the weight of both precedent and opinion sustains; and, it may be added, the weight of judicial utterance as well, though, for a reason which will appear later, judicial utterances in this field do not possess their usual authority.

Furthermore, practical considerations point to the same conclusion. For even if we should admit that Congress, incidentally to discharging some legislative function like that of regulating commerce, might in some sense "recognize" a new state or government, the question still remains how it would communicate its recognition, having the power neither to dispatch nor to receive diplomatic agents. As was said of the States of the Confederation, Congress is as to other governments "both deaf and dumb." Why, then, claim for it a power which it could not possibly use save in some roundabout and inconclusive fashion?

It remains only to add that the power of recognition is sometimes as potent through its non-use as through

[63] *Record*, XXXI, pt. 4, p. 3984.

its use. Thus the downfall of Huerta was due directly to President Wilson's refusal to recognize him as the de facto government of Mexico. Moreover, President Wilson has announced his general intention not to recognize any government grounded on acts of violence, albeit he has since shown ample prudence in applying this policy, as witness his recognition of a revolutionary government in Peru, of Carranza, and of the new Republic of Russia. Still, the statement of policy remains, and its possibilities are palpable.[64]

[64] Tineco, who recently seized the Presidency of Costa Rica, has made extraordinary efforts to regularize his usurpation under the Costa Rican Constitution, with a view to obtaining recognition at Washington; but thus far (July 19, 1917) his efforts have been unavailing.

CHAPTER III

The Making, Enforcement, and Termination of Treaties—Executive Agreements

1—By the constitutional clause dealing with the matter the Senate is associated with the President in the whole business of treaty making. Indeed, it was not till a late stage of the Federal Convention that the President was given any agency in treaty making, the entire function being vested in the Senate. The considerations that moved the Convention in its final disposal of the matter are stated by Jay in the *Federalist* thus:

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions, who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The convention have done well, therefore, in so disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest.

They who have turned their attention to the affairs of men, must have perceived that there are tides in them; tides very irregular in their duration, strength, and direction, and seldom found to run twice exactly in the same manner or measure. To discern and to profit by these tides in national affairs is the business of those who preside over them; and they who have had much experience on this head inform us, that there frequently are occasions when days, nay, even when hours, are precious. The loss of a battle, the death of a prince, the removal of a minister, or other circumstance intervening to change the present posture and aspect of affairs, may turn the most favorable tide into a course opposite to our wishes. As in the field, so in the cabinet, there are moments to be seized as they pass, and they who preside in either should be left in capacity to improve them. So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective, if no attention had been paid to those objects. Those matters which in negotiations usually require the most secrecy and the most despatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the President will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the Senate, he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch, on the other.[1]

At the outset Washington sought to associate the Senate with himself in the negotiation of treaties, but this method of proceeding went badly and was presently abandoned. The episode is well recounted by Maclay in his "Journal":

[1] *The Federalist* (Lodge, Editor), pp. 403-4.

August 22d, Saturday—Senate met, and went on the Coasting bill. The doorkeeper soon told us of the arrival of the President. The President was introduced, and took our Vice-President's chair. He rose and told us bluntly that he had called on us for our advice and consent to some propositions respecting the treaty to be held with the Southern Indians. Said he had brought General Knox with him, who was well acquainted with the business. He then turned to General Knox, who was seated on the left of the chair. General Knox handed him a paper, which he handed to the President of the Senate, who was seated on a chair on the floor to his right. Our Vice-President hurried over the paper. Carriages were driving past, and such a noise, I could tell it was something about "Indians," but was not master of one sentence of it. Signs were made to the doorkeeper to shut the sashes. Seven heads, as we have since learned, were stated at the end of the paper which the Senate were to give their advice and consent to. They were so framed that this could be done by aye or no. . . .

I had at an early stage of the business whispered Mr. Morris that I thought the best way to conduct the business was to have all the papers committed. My reasons were, that I saw no chance of a fair investigation of subjects while the President of the United States sat there, with his Secretary of War, to support his opinions and overawe the timid and neutral part of the Senate. Mr. Morris hastily rose and moved that the papers communicated to the Senate by the President of the United States should be referred to a committee of five, to report as soon as might be on them. He was seconded by Mr. Gunn. Several members grumbled some objections. . . .

I rose and supported the mode of doing business by committees; that committees were used in all public deliberative bodies, etc. I thought I did the subject justice, but concluded the commitment can not be attended with any possible inconvenience. Some articles are already postponed until Monday. Whoever the committee are, if committed, they must make their report on Monday

morning. I spoke through the whole in a low tone of voice. Peevishness itself, I think, could not have taken offense at anything I said.

As I sat down, the President of the United States started up in a violent fret. *"This defeats every purpose of my coming here,"* were the first words that he said. He then went on that he had brought his Secretary of War with him to give every necessary information; that the Secretary knew all about the business, and yet he was delayed and could not go on with the matter. He cooled, however, by degrees. Said he had no objection to putting off this matter until Monday, but declared he did not understand the matter of commitment. He might be delayed; he could not tell how long. He rose a second time, and said he had no objection to postponement until Monday at ten o'clock. By the looks of the Senate this seemed agreed to. A pause for some time ensued. We waited for him to withdraw. He did so with a discontented air. Had it been any other man than the man whom I wish to regard as the first character in the world, I would have said, with sullen dignity.

I can not now be mistaken. The President wishes to tread on the necks of the Senate. Commitment will bring the matter to discussion, at least in the committee, where he is not present. He wishes us to see with the eyes and hear with the ears of his Secretary only. The Secretary to advance the premises, the President to draw the conclusions, and to bear down our deliberations with his personal authority and presence. Form only will be left to us. This will soon cure itself.[2]

It is probably to this same occasion that John Quincy Adams refers in his "Memoirs":

Mr. Crawford told twice over the story of President Washington's having at an early period of his administration gone to the Senate with a project of a treaty to be negotiated, and been present at their deliberations upon it. They debated it and proposed alterations so

[2] *Op. cit.*, pp. 128-32.

that when Washington left the Senate Chamber he said he would be d——d if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate.

The President said he had come into the Senate about 18 months after the first organization of the present government, and then heard that something like this had occurred.[3]

Actually, however, though the rule stated by Adams is the usual one, the President has not infrequently sought the advice of the Senate as to the expediency of negotiating a particular treaty and sometimes as to its very terms. The most notable instance of this sort was furnished by President Polk, who, in a message dated June 10, 1846, sent the Senate the draft of a proposed convention with Great Britain for the settlement of the Oregon boundary. He wrote:

In the early periods of the Government the opinion and advice of the Senate were often taken in advance upon important questions of our foreign policy. General Washington repeatedly consulted the Senate and asked their previous advice upon pending negotiations with foreign powers, and the Senate in every instance responded to his call by giving their advice, to which he always conformed his action. This practice, though rarely resorted to in later times, was, in my judgment, eminently wise, and may on occasions of great importance be properly revived. The Senate are a branch of the treaty-making power, and by consulting them in advance of his own action upon important measures of foreign policy which may ultimately come before them for their consideration the President secures harmony of action between that body and himself. The Senate are, moreover, a branch of the war-making power, and it may be

[3] *Op. cit.*, VI, p. 427.

eminently proper for the Executive to take the opinion and advice of that body in advance upon any great question which may involve in its decision the issue of peace or war. . . . Should the Senate, by the constitutional majority required for the ratification of treaties, advise the acceptance of this proposition, or advise it with such modifications as they may upon full deliberation deem proper, I shall conform my action to their advice. Should the Senate, however, decline by such constitutional majority to give such advice or to express an opinion on the subject I shall consider it my duty to reject the offer.[4]

Other instances of like character are recounted by Mr. Foster in his volume on "The Practice of Diplomacy."[5]

Contrariwise, the Senate may by means of resolutions advise the negotiation of treaties by the President, but such resolutions, it is well recognized, are merely advisory; nor do they depend on the Senate's participation in the treaty making power. Indeed, such resolutions, which are sometimes concurrent, sometimes joint resolutions, may originate in the House as well as the Senate. Numerous instances of the sort are enumerated in the recent edition of Mr. Crandall's volume on "Treaties, Their Making and Enforcement."[6]

At this point two constitutional questions arise. The first is this: Suppose a negotiation already under way, has the Senate the right to interpose in the matter and communicate its views to the President? In the debate given in Part III of this work between Senators Spooner and Bacon, the latter answers this ques-

[4] Richardson, IV, p. 449.
[5] *Op. cit.*, pp. 269-73.
[6] *Op. cit.* (2nd edition), pp. 73-4.

tion in the affirmative, the former in the negative. Probably the correct answer is that the Senate has the right to communicate its views but that the President may make such use of them as he chooses, that being the nature of "advice."

The second question is as to the right of the President to refuse the Senate information with respect to a pending negotiation, if he deems it "incompatible with the public interest" to divulge such information.

The right of the President to refuse information on this ground was first asserted by Washington against a call by the House of Representatives for information with respect to the negotiation of the Jay Treaty of 1794. The words used by the President on this occasion were as follows:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.[7]

It should be noted that the call for information

[7] Richardson, I, pp. 194-5.

which Washington thus refused was made on the assumption that the information was necessary in order to enable the House to discharge properly a constitutional function. Nevertheless, the right of the President to refuse the information on the ground of incompatibility with the public interest was admitted by Madison, who championed the House's view of its powers on this occasion, without qualification. He said:

> On the first point, he observed, that the right of the House to apply for any information they might want, had been admitted by a number in the minority, who had opposed the exercise of the right in this particular case. He thought it clear that the House must have a right in all cases to ask for information which might assist their deliberations on the subjects submitted to them by the constitution; being responsible, nevertheless, for the propriety of the measure. He was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit disclosure of it at the time. And if the refusal of the President had been founded simply on a representation that the contents of the papers asked for, required it, although he might have regretted the refusal, he should have been little disposed to criticise it.[8]

The same reasoning seems applicable to a call for information by the Senate; in point of fact, the majority of the cases in which the President has refused information have originated in calls for it by the Senate.[9] Furthermore, such calls from either of the houses are today almost invariably qualified by the phrase, "if not incompatible with the public interest,"

[8] Benton, I, p. 697.

[9] See Richardson, Index, under title "President."

or some phrase of like import. It should be noted too, that Senator Bacon, in his speech given in Part III, admits the President's right in this respect.

A treaty having been negotiated by the President is then submitted by him to the Senate for its assent, which may be given unconditionally or conditionally, the conditions being stated in the form of amendments to the treaty. This step in the process of treaty making is sometimes spoken of as "ratification," but this usage is inaccurate. The treaty is finally ratified for this Government by the President, whence it follows that he may ratify or not; and the cases are numerous in which the President, dissatisfied with the conditions the Senate has imposed upon its assent to a treaty, has refused to proceed further with it, with the result that the treaty has fallen through.[10] Likewise there are numerous instances in which the President has withdrawn treaties "from the consideration of the Senate, either to effect changes by negotiation or to terminate proceedings thereon."[11]

2—At the threshold of the subject of Treaty Enforcement we encounter a constitutional question which has troubled writers from the beginning of our Government. The question is this: If a treaty, made in due form by the President with the advice and consent of the Senate, requires certain action by Congress before it can be carried into effect, is Congress under constitutional obligation to take such action or is it free to refuse to do so?

[10] Crandall, p. 98.
[11] *Ib.*, pp. 99-100.

This question first arose in connection with the Jay Treaty, the carrying out of certain clauses of which was dependent upon an appropriation of funds by Congress. By Article I, Section 9 of the Constitution, "no money shall be drawn from the Treasury but in consequence of appropriations made by law," that is, as it has always been held, by an act of Congress. When a bill was brought into the House for appropriating the sums needed for the treaty, opposition at once developed, and the claim was advanced that the House was free to grant or withhold the required funds on its own view of the merits of the treaty. This position, moreover, albeit the appropriation was finally passed, received the sanction of a majority of the House, in the following terms:

Resolved, That, it being declared by the second section of the second article of the constitution, "that the President shall have power, by and with the advice of the Senate, to make Treaties, provided two thirds of the Senators present concur," the House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.[12]

The Administration, on the other hand, promptly challenged the validity of these propositions. Its posi-

[12] Benton, I, p. 696.

tion is stated in outline in the message of Washington, just referred to, denying the House certain information on this occasion, but much more elaborately by Hamilton in the draft of a message which he prepared on the subject at Washington's request.[13] The latter document is much too long to quote here, but a very satisfactory summary of it is furnished by Mr. Crandall, as follows:

The argument of Hamilton, as expressed in various letters written at the time and in his draft of a message, was that the Constitution empowered the President and Senate to make treaties; that to make a treaty as between nations meant to conclude a contract obligatory on their good faith; that a contract could not be obligatory to the validity of which the assent of another body was constitutionally necessary; that the Constitution declared a treaty made under the authority of the United States to be a supreme law, but that that could not be a supreme law to the validity of which the assent of another body in the state was constitutionally necessary; that a right of discretionary assent to a contract, under whatever color it might be claimed, was a right to participate in the making of it; and hence that a discretionary right in the House to assent to a treaty, or what was equivalent, to execute it, would negative two important provisions of the Constitution, namely, that the President and Senate have the power to make treaties, and that the treaties so made were laws. It was, he contended, one thing, that a treaty pledging the faith of the nation should by force of moral duty oblige the legislative will to carry it into effect, quite another that it should be itself a law. The latter was the case under the Constitution. There were no express limits to the treaty-making power, and it was a reasonable presumption that it was intended to extend to all treaties usual among nations and so to be commensurate with the variety of exigencies

[13] *Works*, VII, p. 556 ff.

which might arise from intercourse with other nations. Treaties of peace, alliance and commerce were usual among nations. Treaties of peace frequently included indemnification, pecuniary or otherwise. Treaties of alliance necessarily stipulated for the union of forces, and the furnishing of pecuniary or other aid. Treaties of commerce regulated the external commerce of the nation. Unless the treaty power might also act, it would often be inadequate for mere treaties of peace, and always so for treaties of alliance and of commerce. The action of the House was not always deliberative in making appropriations—as for instance, in making an appropriation to defray the expense of an office created by the Constitution or a prior act of Congress. It was discretionary only when the Constitution and laws placed it under no obligation or prohibition. There was, however, this difference between the obligation of the Constitution and the obligation of laws, the former enjoined obedience always, the latter, until annulled by the proper authority. While it was true that the Constitution provided no method of compelling the legislative body to act, it was, nevertheless, under a constitutional, legal, and moral obligation to act where action was prescribed. If the legislative power was competent to repeal this law by a subsequent law, it must be by the whole legislative power, not by the mere refusal of one branch to give effect to it. A legal discretion to refuse the execution of a preexisting law was virtually a power to repeal it. "Hence," he said, "it follows that the House of Representatives have no moral power to refuse the execution of a treaty which is not contrary to the Constitution, because it pledges the public faith; and have no legal power to refuse its execution because it is a law—until at least it ceases to be a law by a regular act of revocation of the competent authority."[14]

This argument has been widely accepted by writers, but it must today be regarded as inconclusive. In

[14] Crandall, pp. 170-1.

contending for the entire validity of the treaty, both as an international compact and as "law of the land," independently of any action by Congress, Hamilton was undoubtedly right; but it does not follow from this that the House was constitutionally bound to appropriate the money which the Executive needed in order to carry out the treaty. Hamilton himself appears to admit that Congress may repeal a treaty in its quality as law of the land; and at any rate the proposition is today well established that Congress may do this in the exercise of its legislative powers—that, as between a treaty and an act of Congress otherwise constitutional, the later in point of time prevails. But, Hamilton objects, such repeal must be "by the whole legislative power, not by the mere refusal of one branch to give effect to it." This is clear nonsense. "The whole legislative power" which Hamilton thus invokes resides in the two houses sitting and acting separately; and it is not apparent what difference there would be between the House of Representatives passing upon a proposal which would effect the repeal of a treaty as domestic law and the same body passing upon a bill to appropriate money to carry out a treaty. In other words, in voting the appropriation to carry out the Jay Treaty, the House of Representatives was exercising its part of "the whole legislative power," and had, accordingly, its right to exercise its full constitutional discretion in the premises. But the fact is that Hamilton was ready to take his stand on the broader ground of the supremacy of the treaty making power over "the whole legislative power," at least if

the testimony of Jefferson is to be relied upon, that he argued in Cabinet for the view that the President and Senate could make a treaty of neutrality which would prevent Congress from declaring war in a particular case.[15] That is a proposition which, if pressed to its logical conclusion, refutes itself. Thus Hamilton warmly and convincingly combated Jefferson's view that the treaty making power could not invade the field of Congress's powers. Yet by the Constitution an act of Congress made in pursuance of the Constitution is as much supreme law of the land as is a treaty made under the authority of the United States, and the President as Chief Executive is bound to see that such laws are enforced. But now, adopting Hamilton's position, how is the President ever to negotiate a treaty the terms of which in any way collide with the provisions of an existing act of Congress? How, indeed, is he ever to recommend changes in existing legislation? The conclusion, therefore, that we must come to is that neither treaties nor acts of Congress can curtail the discretion which constitutionally belongs to any organ of Government, and the only question to be asked in each case is, What is the measure of such discretion?

But this conclusion raises another question, namely, whether there are any other treaty provisions than those requiring an appropriation of money which the treaty making power is unable to render operative without Congressional sanction. It has frequently been contended that treaty provisions which would alter

[15] *Ib.*, p. 241. Hamilton's words at pp. 13-14, *supra*, seem to imply the same view.

the revenue acts are of this character, inasmuch as the Constitution requires that "all bills for raising revenue shall originate in the House of Representatives." The answer to this contention is that a treaty is not a "bill" in any sense of the term; besides which the Supreme Court has repeatedly recognized that treaty provisions may modify existing revenue laws.[16] But in actual practice customs agreements with foreign nations are ordinarily submitted to Congress in one way or other.[17]

Indeed, the treaty making power sometimes elects, even when acting without the field of Congress's enumerated powers, to leave it to Congress to put its engagements into effect by supplementary legislation; and this Congress is able to do by virtue of its "necessary and proper" powers. Such imperfect treaty provisions do not become law of the land until Congress has acted.[18]

We come now to that class of treaty provisions which is capable of enforcement without legislation by Congress. The question that arises with reference to such provisions is whether they address themselves primarily to the Executive or to the Judiciary, and this question is to be answered in the following way:

[16] See Bertram v. Robertson, 122 U. S. 116; and Whitney v. Robertson, 124 U. S. 190.

[17] See *Sen. Doc.* 231, 56 Cong., 2 Sess., VII, 25; cf. H. Reps., 48 Cong., 2 Sess., III, no. 2680.

[18] See Foster v. Neilson, 2 Peters 253, 314, with which compare Justice Baldwin's opinion in Pollard's Lessee v. Kibbe, 14 Peters 353, 415. More recent cases illustrating the same point are U. S. v. Rauscher, 119 U. S. 407; and Neely v. Henkel, 180 U. S. 109.

If the provision is primarily for the benefit of the other contracting sovereignty in its quality of government, as for example is the case with extradition agreements, it addresses itself first of all to the President, the organ of foreign relations; if on the other hand the provision furnishes the basis of private claims by the citizens or subjects of the other contracting sovereignty, such claims must first be prosecuted through the courts.

As a situation illustrative of the first class of treaty provision, we may take the famous case of Thomas Nash, alias Jonathan Robbins, which arose in 1799 under the twenty-seventh article of the Jay Treaty. This article provided for the reciprocal surrender by the contracting governments of persons charged in the dominions of either with murder or forgery, and taking refuge in the territory of the other. Nash, then in the territory of the United States, having been charged by Great Britain with murder, was surrendered to the British authorities without a judicial hearing, upon the order of President Adams, and was subsequently tried and executed in London. The case created a great stir and presently resolutions were introduced into the House of Representatives with reference to it. The gravamen of the criticism against Adams was that the matter of the surrender was one for the courts and not for the Executive. John Marshall, then a member of the House, undertook to defend Adams's course, and with brilliant success. On the question of executive authority he said:

The gentleman from Pennsylvania and the gentleman

from Virginia have both contended that this was a case proper for the decision of the court, because points of law occurred, and points of law must have been decided in its determination.

The points of law which must have been decided, are stated by the gentleman from Pennsylvania to be, first, a question whether the offence was committed within the British jurisdiction; and, secondly, whether the crime charged was comprehended within the treaty.

It is true, sir, these points of law must have occurred, and must have been decided; but it by no means follows that they could only have been decided in court. . . .

The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American Government was bound to restore them, if in its power, were questions of law; but they were questions of political law, proper to be decided, and they were decided by the Executive, and not by the courts.

The *casus foederis* of the guarantee was a question of law, but no man could have hazarded the opinion that such a question must be carried into court, and can only be there decided. So the *casus foederis,* under the twenty-seventh article of the treaty with Great Britain, is a question of law, but of political law. The question to be decided is, whether the particular case proposed be one in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts. . . .

The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide them. Of consequence, the demand is not a case for judicial cognizance.

The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

He possesses the whole Executive power. He holds

and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the Executive Department to execute the contract by any means it possesses. . . .

The Executive is not only the constitutional department, but seems to be the proper department to which the power in question may most wisely and most safely be confided.

The department which is intrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements with foreign nations, and for the consequences resulting from such violation, seems the proper department to be intrusted with the execution of a national contract like that under consideration.

If, at any time, policy may temper the strict execution of the contract, where may that political discretion be placed so safely as in the department whose duty it is to understand precisely the state of the political intercourse and connection between the United States and foreign nations, to understand the manner in which the particular stipulation is explained and performed by for-

eign nations, and to understand completely the state of the Union?

This department, too, independent of judicial aid, which may, perhaps, in some instances, be called in, is furnished with a great law officer, whose duty it is to understand and to advise when the *casus foederis* occurs. And if the President should cause to be arrested under the treaty an individual who was so circumstanced as not to be properly the object of such an arrest, he may perhaps bring the question of the legality of his arrest before a judge, by a writ of *habeas corpus.*

It is then demonstrated, that, according to the principles of the American Government, the question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive Department.[19]

To this statement one exception must be taken, and that is to the assertion that "Congress may unquestionably prescribe the mode and Congress may devolve on others the whole execution of the contract." This admission conflicts with the entire tenor of Marshall's argument, which rests at bottom on the proposition that the act of surrender was a diplomatic transaction and therefore an executive act. This proposition has, moreover, received the repeated approval of the Supreme Court in recent years, an instance being the following passage from its decision in Terlinden v. Ames:

The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. Holmes v. Jennison, 14 Pet. 540, 569. Its

[19] Benton, II, pp. 466-7.

exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs. . . .

The decisions of the executive department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.[20]

It is true that by the Act of 1848,[21] which was enacted in effectuation of Article X of the Webster-Ashburton Treaty of 1842, complaints for extradition may today be lodged with any court of record of general jurisdiction, which hears evidence as to the criminality of the offense charged, under the laws of the country demanding extradition; but the final act of surrender still rests with the discretion of the President, nor could it constitutionally rest elsewhere.

An illustration of treaty provisions capable of enforcement by the courts is furnished by stipulations removing the disability of alienage in the holding of real estate. Thus Article IX of the Jay Treaty provided as follows:

It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles

[20] 184 U. S. 270, 289-90. See also Charlton v. Kelly, 229 U. S. 447.

[21] R. S. § 5270.

therein; and may grant, sell or devise the same to whom they please, in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens.

Such engagements have frequently clashed with State laws touching the same subject, but have been invariably sustained by the Court.[22]

The question of the enforcement of treaties raises naturally the question of their interpretation. To which organ of the Government does this belong in the case of self-executing provisions, which are law of the land? The answer is, to that organ which, at the moment, is called upon to enforce them. However, it must be added: first, that the judiciary will always give great weight to any known interpretation by the Executive, and secondly, that any judicial interpretation of a treaty provision must yield to the determination by the President or Congress, as the case may be, that such treaty provision is no longer in force. As was said by the Court in Botiller v. Dominguez:

> This Court . . . has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, chooses to disregard.[23]

The reason underlying this rule is clear: It is that no treaty provision can operate as law of the land

[22] See generally the present writer's *National Supremacy*. Holt & Co., 1913.

[23] 130 U. S. 238, 247.

which is not *first* operative as an international engagement, and the question whether it is so operative is a "political question."[24]

We come now to the President's authority, in the absence of statutory provision, to anticipate and prevent a pending breach of a treaty provision which supports private rights. If we are to follow the line of reasoning taken by the Supreme Court in the familiar

[24] It has been argued that a known interpretation of a treaty provision by the Executive is conclusive on the courts. See a note in the *Michigan Law Review* (Vol. 15, p. 487) on the decision of the Court in the case of the Appam, 243 U. S. 124. This was a British vessel captured by the German raider Moewe and brought into Norfolk by a prize crew. The question in the case was whether the captors were entitled, under the Treaties of 1799 and 1828 with Prussia, to retain their prize in American waters throughout the war. The State Department resolved the question in the negative, and the Supreme Court, in the action instituted by the former British owners, arrived at the same conclusion but by an independent line of reasoning. The argument of the writer in the note just cited is that, inasmuch as the interpretation of a treaty provision in its quality as an international compact, or in response to a political demand thereon, is a political question, the determination arrived at by the political department is binding on the courts when they come to interpret the same provision in private cases. This argument receives some support from the Court's own language in the case of in re Cooper, 143 U. S. 472, 502-5; also from Justice Gray's concurring opinion in the Rauscher case; but it clearly runs counter to the majority of opinions, written in both instances by Justice Miller, in the Head Money Cases (given later), 112 U. S. 580, and the Rauscher case, 119 U. S. 407. I feel bound to add that the Court's decision of the principal question before it in the Appam Case seems to me to run counter to a good deal of law. Indeed, I fail to see how the Court ever got jurisdiction of the vessel. See Exchange v. McFadden, 7 Cranch 116.

Neagle and Debs cases, the power of the President in such a situation is very broad indeed.

The facts of the former case were as follows: A disgruntled suitor, one Terry, threatened to shoot Justice Field of the United States Supreme Court at sight. To meet the danger the President detailed Neagle, a United States marshal, to protect the Justice, and Neagle, intercepting Terry as he was approaching Field in a hostile manner, shot and killed him. This occurred in the summer of 1889. On being arrested for homicide by the authorities of California, where the act occurred, Neagle applied for a writ of habeas corpus in the United States Court, and the question turned on his right to act as he had done. No act of Congress was pleadable that covered the ground, but the Supreme Court vindicated him on the basis of the President's authority in the situation, saying:

> The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.
>
> If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in

the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection.[25]

In the Debs case, which grew out of the Chicago strike of 1894, the Court, with clear reference to the action of the President in dispatching troops to the scene of trouble in order to keep the United States mails and interstate commerce moving, said:

The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate com-

[25] 135 U. S. 1, 63-4.

merce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.[26]

Furthermore, the actual decision in this case thrust a new weapon into the hands of the Executive in such exigencies, the right to invoke the equity powers of the United States courts to enjoin a threatened breach of the law to the detriment of private rights, and thus to place future law breakers in contempt of court. In harmony with this principle, when in 1906 the City of San Francisco adopted legislation alleged to be derogatory of the rights of Japanese subjects under the treaty of 1894 between the United States and Japan, the Government filed a bill in equity in the Circuit Court of California.[27] Later, however, with the withdrawal of the objectionable measure by the municipal authorities on account of the strenuous insistence of President Roosevelt, the suit was dismissed.

Lastly, we should note in passing the duty of the President to take such measures as are necessary to the fulfillment of the obligations of the United States at International Law. In this connection the action of President Wilson in taking over the wireless station at Siasconset at the opening of the present war, in order to prevent possible breaches of our neutrality, is still fresh in mind. The opinion of the Attorney-General sustaining this action contains the following words:

[26] 158 U. S. 564, 582.
[27] 12 Mich. Law Rev. 583.

The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander-in-Chief of the Army and Navy. . . . If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be, endangered by action deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restrictions, he may act through such executive office or department as appears best adapted to effectuate the desired end. . . . I do not hesitate, in view of the extraordinary conditions existing, to advise that the President, through the Secretary of the Navy, or any other appropriate department, close down or take charge of, and operate, the plant . . . should he deem it necessary to secure obedience to his proclamation of neutrality.[28]

3—In turning to the subject of the termination of treaties, it behooves us to recall again the dual nature of treaties under the Constitution. In their quality of domestic law treaties are at all times subject to repeal by later conflicting acts of Congress which are otherwise constitutional. This doctrine, which is grounded on the familiar principle of *leges posteriores priores contrarias abrogant,* was first advanced in certain opinions of Attorneys-General of the United States and is now the settled doctrine of the Supreme Court.[29] It is stated most broadly by Justice Miller in his opinion in the "Head Money Cases," as follows:

[28] *New York Times,* Sept. 14, 1914. The President, acting within his own field, is not bound by judicial views of International Law, Francis Wharton, *Digest,* § 238.

[29] 5 *Opinions* 333, 345; 6 *ib.* 291; 13 *ib.* 354; Taylor v. Morton, 2 Curt. C. C. 454; Cherokee Tobacco Case, 11 Wall. 621; "Head Money Cases," *infra.* See also U. S. v. Lee Yen Tai, 185 U. S. 213.

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made, which gives it this superior sanctity.

A treaty is made by the President and the Senate.

Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.

In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.[80]

But this language, it will be noted, still leaves open the question as to which branch of the Government may terminate treaties of the United States in their quality as international compacts. A treaty may, of course, be superseded by a new treaty made in the same way as its predecessor was. Aside from this, a treaty of the United States may either be terminated by notice, given in accordance with the treaty itself; or it may be abrogated by the Government for reasons deemed by it to be sufficient in International Law; or finally, it may be adjudged as having lapsed. First we may consider the question as to which organ of the Government should pronounce upon the termination of a treaty or decree its abrogation.

The first case of outright abrogation by the United States occurred in 1798, when Congress, by the act of July 7 of that year, pronounced the United States

[80] 112 U. S. 580, 598-9.

"freed and exonerated from the stipulations" of the Treaties of 1778 with France.[31] This act was followed two days later by an act authorizing limited hostilities against the same country; and in the case of Bas v. Tingy[32] the Supreme Court treats the act of abrogation as simply one of a bundle of acts declaring "public war" upon the French Republic.

The initial precedent in the matter of termination by notice occurred in 1846, when by the joint resolution of April 27, Congress "authorized" the President "at his discretion" to give the British Government notice of the abrogation of the Convention of August 6, 1827, relative to the joint occupation of the Oregon Territory. As the President himself had requested the resolution, the episode clearly supports the theory that international conventions to which the United States is party must be terminated by act of Congress.[33]

There are later precedents, however, which obscure this verdict somewhat. One of the most recent ones is discussed by ex-President Taft in his little volume on "The Presidency," as follows:

[31] 1 Stat. L. 578.

[32] 4 Dallas 37.

[33] See Richardson, IV, 397; and Benton, XV, 478. Mangum of North Carolina denied that Congress could "authorize" the President to give notice: "He entertained not a particle of doubt that the question never could have been thrown upon Congress unless as a war or quasi war measure. . . . Congress had no power of making or breaking a treaty." He owned, however, that "he might appear singular" in his view of the matter. *Loc. cit.*, p. 472.

In my administration the lower house passed a resolution directing the abrogation of the Russian Treaty of 1832, couched in terms which would have been most offensive to Russia, and it did this by a vote so nearly unanimous as to indicate that in the Senate too, the same resolution would pass. It would have strained our relations with Russia in a way that seemed unwise. The treaty was an old one, and its construction had been constantly the subject of controversy between the two countries, and therefore, to obviate what I felt would produce unnecessary trouble in our foreign relations, I indicated to the Russian ambassador the situation, and advised him that I deemed it wise to abrogate the treaty, which, as President I had the right to do, by due notice couched in a friendly and courteous tone and accompanied by an invitation to begin negotiations for a new treaty. Having done this, I notified the Senate of the fact, and this enabled the wiser heads of the Senate to substitute for the House resolution a resolution approving my action, and in this way the passage of the dangerous resolution was avoided.[34]

The resolution in question, it should be added, was a joint resolution, and purported to "ratify" the President's action. The President himself had asked only for "ratification and approval" of his course by the Senate.[35]

[34] *Op. cit.*, pp. 112-4.

[35] Crandall, p. 462. By the "LaFollette-Furuseth Seamen's Act," approved March 4, 1915, the President was directed, "within ninety days after the passage of the act, to give notice to foreign governments that so much of any treaties as might be in conflict with the provisions of the act would terminate on the expiration of the periods of notice provided for in such treaties," *ib.*, p. 460; 38 Stat. L. 1164, 1184. On March 6, 1917, the Supreme Court, in U. S. v. Pulaski Co. et al, and other cases (nos. 149-162), held that the five per cent tariff discount given to merchandise imported in American bottoms by the Act of Oct. 3,

Two other precedents bearing on the outright abrogation of treaties should be noted. The question of regarding the extradition article of the Treaty of 1842 with Great Britain as void on account of certain acts of the British Government was laid before Congress by President Grant in a special message dated June 20, 1876, in the following terms:

It is for the wisdom of Congress to determine whether the article of the treaty relating to extradition is to be any longer regarded as obligatory on the Government of the United States or as forming part of the supreme law of the land. Should the attitude of the British Government remain unchanged, I shall not, without an expression of the wish of Congress that I should do so, take any action either in making or granting requisitions for the surrender of fugitive criminals under the Treaty of 1842.[86]

Three years later Congress passed a bill requiring the President to abrogate Articles V and VI of the Treaty of 1868 with China. President Hayes vetoed it, partly on the ground that "the power of modifying an existing treaty is part of the treaty making power under the Constitution." At the same time, he also wrote:

The authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no

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1913 (38 Stat. L. 196, ch. 16, § IV, J, subsec. 7) with the proviso that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation," is inoperative so long as the present reciprocity treaties with foreign countries remain in force.

[86] Richardson, VII, p. 373.

longer to adhere to it is as free from controversy under our Constitution as is the further proposition that the power of making new treaties or modifying existing treaties is not lodged by the Constitution in Congress, but in the President, by and with the advice and consent of the Senate, as shown by the concurrence of two-thirds of that body.[87]

All in all, it appears that legislative precedent, which moreover is generally supported by the attitude of the Executive, sanctions the proposition that the power of terminating the international compacts to which the United States is party belongs, as a prerogative of sovereignty, to Congress alone. This result no doubt transgresses the general principle of the residual power of the Executive in foreign relations, but it flows naturally, if not inevitably, from the power of Congress over treaty provisions in their quality as "law of the land." Furthermore, by Article I, Section 8, Paragraph 10 of the Constitution, Congress has the power to "define and punish . . . offenses against the Law of Nations," and so, it has been generally held, the power to define International Law is general for the United States.

On the other hand, there is clear judicial recognition that the President too may validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in Charlton v. Kelly is pertinent:

If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international

[87] *Ib.*, p. 518.

law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.[88]

Since, as I remarked above, the validity of treaty provisions as "law of the land" depends upon their binding character as international engagements, it seems clearly necessary to attribute some such limited power of treaty abrogation, if it may be so called, to the President.

4—The national Government's power of entering into agreements with foreign states is not exhausted in treaty making, and there are agreements with such states which do not have to be submitted to the Senate for its advice and consent.

These fall into two main orders: first, those of which the initiating force is the power of Congress; second, those which the President may make in virtue either of his diplomatic powers or of his powers as Commander-in-Chief of the Army and Navy.

[88] 229 U. S. 447, 473-6.

Of agreements authorized by Congress and in the making of which the President or some designated head of department acts simply as the agent of the National Legislature, the principal varieties are postal conventions, copyright and trade mark conventions, and reciprocity agreements.[39] Thus the Postmaster-General was authorized to enter into postal conventions as early as 1792. Nearly a hundred years later Section 3 of the McKinley Tariff Act bestowed authority upon the President which led to ten reciprocal commercial arrangements with as many foreign governments. The validity of Section 3, however, was soon challenged on two grounds: first, that it attempted to delegate legislative power unconstitutionally; and secondly, that it purported to authorize the President to do by himself what he could constitutionally do only with the advice and consent of the Senate, that, in other words, it invaded the treaty making power. The Supreme Court in Field v. Clark[40] overruled both of these contentions and sustained the provision as a measure necessary and proper for carrying out certain powers of Congress.

Turning now to the class of agreements which rests on the power of the President alone, we may first consider certain ones which he has entered into by virtue of his powers as Commander-in-Chief of the Army and Navy. One of the earliest conventions of this sort was that "reached with Great Britain and recorded in notes exchanged at Washington, April

[39] See Crandall, ch. IX.
[40] 143 U. S. 649.

28-29, 1817, between Mr. Bagot, the British minister, and Mr. Rush, acting Secretary of State," for the limitation of naval forces on the Great Lakes. Nearly a year later, however, the President seems to have had some compunctions as to the regularity of this arrangement and so referred it to the Senate, which promptly approved it by the necessary two-thirds vote, and it has remained in effect ever since.[41]

In the early '80s the President entered into a series of agreements with the Mexican Government, "providing reciprocally for the crossing of the international boundary line in unpopulated places by the troops of the respective countries in close pursuit of savage bands of Indians."[42] It is on these agreements that President Wilson modelled the protocol submitted to the Mexican commissioners last summer at Atlantic City, which would have provided for a reciprocal right in the two governments to pursue outlaw forces across the frontier. The Mexican commissioners refused to accept the arrangement.

Other examples of this species of agreement are noted by the Justices in their opinions in Tucker v. Alexandroff, where the question of their validity is touched upon in rather equivocal terms, as follows:

> While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.[43]

[41] Crandall, pp. 102-3.

[42] *Ib.*, pp. 104-5; Moore, *Digest*, p. 389 ff.

[43] 183 U. S. 424, 435.

And again:

> The jurisdiction of every nation within its own territory is absolute and exclusive; by its own consent only can any exception to that jurisdiction exist in favor of a foreign nation; and any authority in its own courts to give effect to such an exception by affirmative action must rest upon express treaty or statute. . . . It is not necessary in this case to consider the full extent of the power of the President in such matters.[44]

Of a more strictly diplomatic character are the agreements which have been entered into by the President from time to time without the advice and consent of the Senate, for the settlement of the pecuniary claims of our citizens against foreign governments.[45] It appears, however, that no such arrangement has ever been entered into for the adjustment of claims of aliens against our Government without the preliminary authorization of an agreement which had been submitted to the Senate.

Then there are numerous devices resorted to in ordinary diplomatic correspondence which frequently yield what are tantamount to agreements: a mere exchange of notes, such as took place in 1899 and 1900 between our State Department and the governments of Great Britain, France, Germany, Russia, Italy, and Japan, with reference to the "Open Door" policy in China; an exchange of what are called "identical notes," such as took place November 30, 1908, between the United States and Japan, whereby the two governments pledged their continued fidelity to the

[44] *Ib.*, p. 459.
[45] Crandall, pp. 108-11.

maintenance of the integrity of China and of equal commercial opportunity throughout the Chinese Empire for all nationalities; the "gentlemen's agreement," a new invention, such as that which at present regulates Japanese immigration to this country; and finally, the modus vivendi, such as that which for more than a quarter of a century, after the termination of the Treaty of Washington in 1885, defined American fishing rights off the coasts of Canada and Newfoundland.[46]

The question that suggests itself at this point is: How, in face of all these devices, is the Senate to be assured its due participation in treaty making? Whenever it is desirable that an agreement have the force of domestic law, the Senate must, ordinarily certainly, be resorted to.[47] Yet again, what executive authority has called into existence the same authority may also abate. For the rest, however, the criteria seem lacking for a nice differentiation of the prerogative under discussion from the treaty making power, with the result that its curtailment, like that of the power of the President in appointing "special agents," is a prob-

[46] See generally Crandall, ch. VIII; and Moore's *Digest*, V, p. 210 ff.

[47] But if the "agreement" is within the power of the President and is not in conflict with acts of Congress, it would be pleadable like any other executive act done with authority. Thus should he, assuming his right to do so, give his consent to the passage of foreign troops through the territory of a State of the United States, by International Law the domestic jurisdiction would not extend to such forces, and to any attempt to make it so extend such consent would be a sufficient answer.

lem of practical statesmanship rather than of Constitutional Law.[48]

This was proved most strikingly in the case of the agreement which President Roosevelt made in 1905 with Santo Domingo, for putting the customs houses of that island under American control. Mr. Roosevelt tells the story of this agreement in his "Autobiography," as follows:

The Constitution did not explicitly give me power to bring about the necessary agreement with Santo Domingo. But the Constitution did not forbid my doing what I did. I put the agreement into effect, and I continued its execution for two years before the Senate acted; and I would have continued it until the end of my term, if necessary, without any action by Congress. But it was far preferable that there should be action by Congress, so that we might be proceeding under a treaty which was the law of the land and not merely by a direction of the Chief Executive which would lapse when that particular Executive left office. I therefore did my best to get the Senate to ratify what I had done. There was a good deal of difficulty about it. . . . Enough Republicans were absent to prevent the securing of a two-thirds vote for the treaty, and the Senate adjourned

[48] Note the usage of Art. I, Sec. 10, of the Constitution, where the States are forbidden absolutely to enter into "any treaty, alliance or confederation," and "without the consent of Congress" to enter into "any agreement or compact with another state or foreign power." A not very successful attempt is made to distinguish these terms by Chief Justice Taney, in Holmes v. Jennison, 14 Peters 540, 571-2. See also Virginia v. Tennessee, 148 U. S. 503, where it was held that the consent of Congress is not necessary to *all* compacts or agreements between States but only to those "directed to the formation of any combination tending to the increase of the political power of the States, which may encroach upon or interfere with the just supremacy of the United States."

without any action at all, and with the feeling of entire self-satisfaction at having left the country in the position of assuming a responsibility and then failing to fulfil it. Apparently the Senators in question felt that in some way they had upheld their dignity. All that they had really done was to shirk their duty. Somebody had to do that duty, and accordingly I did it. I went ahead and administered the proposed treaty anyhow, considering it as a simple agreement on the part of the Executive which would be converted into a treaty whenever the Senate acted. After a couple of years the Senate did act, having previously made some utterly unimportant changes which I ratified and persuaded Santo Domingo to ratify. In all its history Santo Domingo has had nothing happen to it as fortunate as this treaty, and the passing of it saved the United States from having to face serious difficulties with one or more foreign powers.[49]

In other words, the only important difference between the President's "agreement" and the "treaty" which superseded it is to be found in the fact that the latter was ratified by the Senate, with the result, however, of putting affairs on a durable basis.

And the same point is further illustrated by the dispute which developed in 1905 between President Roosevelt and the Senate over the Hay arbitration treaties. The first two articles of these proposed treaties read as follows:

Article I. Differences which may arise of legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the

[49] *Op. cit.*, pp. 551-2. For the debate in the Senate on this matter, see the references in notes 2 and 3, Part III.

vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties.

Article II. In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure.[50]

"In the Senate," to use Professor Willoughby's account of the matter,

objection developed to the provision that the definition of the matter in dispute and the fixing of the powers of the arbitrators should be "by special agreements," which, the terminology would imply, might be entered into, in each case, by the President without consulting the Senate. That body, therefore, amended the treaty projects by substituting the word "Treaty" for the word "Agreement." The effect of this change was, of course, to make it necessary to obtain the approval and consent of the Senate to each and every proposition that might thereafter arise for submitting a dispute to arbitration, even when such propositions were clearly within the scope of Article I of the treaties which Secretary Hay had negotiated. President Roosevelt holding that thus, in any event, a special treaty would have to be negotiated and approved by the Senate before a matter could be submitted to arbitration, declared that the ratification of the so-called general arbitration treaties which the Senate had amended, would achieve nothing, and declined to submit them, as thus amended, to the foreign countries concerned, for their approval, and the whole project was, for the time being at least, abandoned.[51]

A similar dispute arose in President Taft's adminis-

[50] Willoughby, *Constitutional Law*, I, pp. 473-4.

[51] *Ib.*

tration, which is recounted in his recent volume "The Presidency," thus:

I have been greatly interested in securing the adoption of general treaties of arbitration to dispose of all justiciable questions that are likely to arise between the nations. I attempted to secure the ratification by the Senate of treaties of this kind which I had made with France and England. The Senate refused to confirm the treaties except with such narrowing amendments that it seemed to me futile to attempt to negotiate them. The turning-point was whether the Senate had the power to agree that all questions of a certain description should be submitted to arbitration and to leave to the tribunal of arbitration the question of jurisdiction under it, that is, the issue whether a future controversy involved questions within the class. Learned senators contended that this would be an invalid delegation of the function of the Senate to a tribunal of arbitration. It would not be a delegation of the authority of the Senate any more than it would be a delegation of the authority of the President, because the Senate's function is no more sacred, and no more necessary to the making of a treaty, than is the function which the President performs. I confess I have never been able to appreciate the force of the negative argument by the Senate in regard to this matter. The question of the jurisdiction of a tribunal to hear a particular question and to decide whether the question comes within the class of questions over which the treaty gives them jurisdiction is a question of the construction of a treaty, and the construction of a treaty is one of the commonest issues between nations submitted to arbitration. The agreement to abide a judgment as to jurisdiction in future is no more a delegation of control over foreign affairs than is an agreement to abide a judgment of an existing controversy in respect to such relations. The narrow view that the Senate has taken in this matter is inconsistent with any arbitration at all, and it precludes all useful treaties of arbitration in advance of the occurrence of the quarrel to be arbitrated. It

destroys all hope of an international court for the settlement of international disputes. The position is utterly untenable as a question of constitutional law.[52]

But while the Senate succeeded on these two occasions in defending its participation in treaty making, against what it considered a threatened encroachment, it is not always so favorably circumstanced, and our final verdict must be that the President's prerogative in the making of international compacts of a temporary nature and not demanding enforcement by the courts is one that is likely to become larger before it begins to shrink. Two recent executive agreements mentioned by Mr. Crandall are much in point in this connection:

> The agreement in notes exchanged, April 17, 1913, with the government of Panama, reciprocally permitting consuls to take note of declarations of values of exports made by shippers before customs officers; and the arrangement effected by exchange of notes with the British government, September 1 and September 23, 1913, for extradition, between the Philippine Islands or Guam and British North Borneo, of fugitive offenders for offenses specified in the extradition conventions existing between the two countries.[53]

Judged for the subject matter they deal with, both these agreements clearly enter the field of treaty making. Finally, the papers informed us on April 10, that instead of a "full alliance" "America will have a 'gentlemen's agreement' with the Entente."

[52] *Op. cit.*, pp. 102-4.
[53] *Treaties, Their Making and Enforcement*, p. 117.

CHAPTER IV

Presidential War Making—Political Questions

1—Presidential initiative in the formulation of our foreign policy is a familiar fact. The neutrality of 1793, the annexation of Louisiana, the Monroe Doctrine, the annexation of Texas, the Mexican War and its conquests, the acquisition of Alaska, the peaceful settlement of the Alabama claims, the construction of an American built and an American owned canal across the Isthmus of Panama, the "Big Stick" doctrine, the "Open Door" policy, recent Pan-Americanism, and lastly, our entrance into the war against German militarism—all these, and many more items of the same character, must be set down to the credit of executive leadership in the field of foreign relations. It is likewise a familiar fact that the ultimate viability of an executive policy in this field will depend upon the backing of public opinion as reflected in Congress, or in the Senate, and not a few Presidential programs have had to be abandoned outright or modified because of their failure to obtain this backing; as for instance, Adams and Clay's Pan-American policy, Pierce's Cuban policy, Grant's Santo Domingo policy, Cleveland's Hawaiian policy. Finally, in one or two instances Congressional pressure has forced unwelcome policies upon a reluctant Executive, the principal examples

being the War of 1812 and the intervention in Cuba in 1898.

We are thus brought to consider a question which has been raised at various times, though the answer to it seems clear enough; and that is whether, in view of the fact that Congress is given the power to declare war, the President is under constitutional obligation not to incur the risk of war in the prosecution of his diplomatic policies. The idea that he is under some such obligation was brought forward in the Senate in 1826, in opposition to Adams's proposal to send envoys to the Panama Congress, but it was very satisfactorily answered, I think, by Senator Johnston of Louisiana, thus:

> There is nothing peculiar in the present case. The President has, at all times, the power to commit the peace of this country, and involve us in hostilities, as far as he has power in this case. To him is confided all intercourse with foreign nations. To his discretion and responsibility is intrusted all our delicate and difficult relations: all negotiations and all treaties are conducted and brought to issue by him. He speaks in the name and with the authority of this Government with all the powers of Europe. That confidence has never been deceived. The character, talent, and public virtue, which placed them in that high station, is the guarantee of their conduct. Their own fame, their love of country, make it their interest and their duty to cultivate peace, commerce, and honest friendship, with all nations: and all the motives of self-love and ambition conspire to ensure from them, as from us, a faithful discharge of the trust confided to them by the constitution and the country. But there must be confidence. No Government can exist without it. And this distrust and jealousy of the Executive will destroy all power to do good, and all power to act efficiently.[1]

[1] Benton, VIII, p. 439.

The same question was again raised in 1844 by the opponents of Tyler's treaty for the annexation of Texas, which, they asserted, was calculated to bring on war with Mexico. On this occasion Senator Benton of Missouri introduced the following resolutions:

Resolved, That the ratification of the treaty for the annexation of Texas to the United States would be an adoption of the Texian war with Mexico by the United States, and would devolve its conduct and conclusion upon the said United States.

Resolved, That the treaty-making power does not extend to the power of making war, and that the President and Senate have no right to make war, either by declaration or adoption.[2]

Walker of Mississippi defended the President's course thus:

An avowed purpose to make a war, without any actual conflict, or any means prepared to conduct it, is declared to be conclusive against the ratification of the treaty. If this be so, this state of things may be perpetual. I consider the grounds assumed in opposition to this treaty as utterly unfounded in fact; and as derogatory to the dignity, and dangerous to the peace and safety, of the American people. I consider them deeply injurious to our vital interests at this moment, and of most evil example in all time to come. I consider them as groundless objections, operating only for the benefit of foreign powers, and especially of England and Mexico; and as abandoning the rights and interests of our own country. I consider them as stripping this nation of many of the vital attributes of sovereign power, inflicting upon her fearful injuries at this period, and, if adopted as precedents, subjecting us, in all time to come, to great sacrifices and imminent perils. It is to take up the exploded doctrine of a paper blockade, so long and arrogantly

[2] *Globe,* XIII, Appendix, p. 474.

maintained by England, and apply it in a manner still more injurious to our interests, to paper conflicts upon the land. The doctrine of England was, that a paper blockade announced by a British order in council, was decisive against the rights of neutral powers. And now, the doctrine is, that a war upon paper, existing only in threats and proclamations, is equivalent to an actual contest, in its effects and consequences upon a neutral power. . . . The treaty neither makes nor adopts a war, nor does it give just cause of war. That war may be proclaimed by Mexico against us, if the treaty is ratified, is a possible event. But has it come to this, that the treaty power is expunged from the constitution, or can never be exercised, because, if we ratify a treaty, however just, or expedient, or necessary, we may be threatened with war, or it may follow as a consequence? If so, the most powerful or the most insignificant nation has only to threaten us with a war, as a consequence of the ratification of a treaty, and the treaty-making power expires, or must not be exercised; and the same consequences would flow from this doctrine, if we were threatened with war as the result of a refusal to ratify a treaty, and would compel us to sanction it by our votes. The moral right, and the constitutional power of the Senate to ratify or reject a treaty, does not depend upon the fact, whether a war may or may not follow directly as a consequence. We all know that neither the President nor the Senate, nor both combined, can *declare war*. Nor is it in the power of logic or metaphysics to make it appear that the ratification of this treaty is a *declaration of war*. It is true that, as a consequence of this act, Mexico may declare war against us; but even then, there would be no war on our part, until it was declared by Congress.[8]

The treaty was defeated and Texas was eventually annexed by joint resolution, but this was due rather to Tyler's unpopularity than to Benton's argument.

[8] *Ib.*, p. 552. The question raised by the last sentence of the above quotation is discussed in Section 2 of this chapter.

In more recent years the same point was raised in connection with President Cleveland's intervention in the British-Venezuelan boundary dispute, in 1897. On this occasion Senator Sewell of New Jersey offered a series of resolutions, one of which declared that:

> Neither Congress nor the country can be or has been committed by the action or position of the Executive Department in reference to the Venezuelan boundary controversy, as to the course to be pursued when the time shall have arrived for a final determination.[4]

Answering this resolution and Sewell's declaration in support of it, that the President has not the right to commit the United States to war, Senator Daniel of Virginia said:

> That the Executive could not commit Congress or the country by his action is readily admitted. But it may as well be stated at the same time that the country has never refused yet in all its history to stand by a President who was guarding its rights and interests.[5]

This very justifiable conclusion is paralleled by Professor Pomeroy in his work on "Constitutional Law," thus:

> The President cannot declare war; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative; and that step once taken, the challenge cannot be refused. How easily might the Executive have plunged us into a war with Great Britain by a single despatch in answer to the affair

[4] *Record*, 54 Cong., 1 Sess., p. 726, 786-7.
[5] *Ib.*, p. 912.

of the Trent. How easily might he have provoked a condition of active hostilities with France by the form and character of the reclamations made in regard to the occupation of Mexico.

I repeat that the Executive Department, by means of this branch of its power over foreign relations, holds in its keeping the safety, welfare, and even permanence of our internal and domestic institutions. And in wielding this power, it is untrammelled by any other department of the government; no other influence than a moral one can control or curb it; its acts are political, and its responsibility is only political.[6]

2—But as between the right to incur a possible risk of war and a right to perform acts of war without Congressional authorization, there is an obvious difference. We now pass to the question whether the President, by virtue not only of his diplomatic powers but also of his power as Commander-in-Chief of the Army and Navy, ever has the latter right. The question has been raised in three classes of instances, which may be discussed seriatim: first, where the precise question was as to the power of the President to recognize a state of war as resulting from the acts of some other power, and to take measures accordingly; secondly, where the question was as to his right to take measures which were technically acts of war, in protection of American rights abroad; thirdly, where the question was as to his right to take similar measures in protection of certain "inchoate" national interests abroad, interests arising out of a pending treaty or a diplomatic policy.

The question as to the President's power to recog-

[6] *Op. cit.*, p. 565.

nize a state of war in consequence of the hostile acts of another power was first raised in Jefferson's Message of December 8, 1801:

Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary. The Bey had already declared war. His cruisers were out. Two had arrived at Gibraltar. Our commerce in the Mediterranean was blockaded and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with and engaged the small schooner Enterprise, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part. The bravery exhibited by our citizens on that element will, I trust, be a testimony to the world that it is not the want of that virtue which makes us seek their peace, but a conscientious desire to direct the energies of our nation to the multiplication of the human race, and not to its destruction. Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight.[7]

[7] Richardson, I, pp. 326-7.

This characteristic Jeffersonian passage betwixt the Scylla and Charybdis of Tweedledum and Tweedledee aroused the ire of Hamilton, who, writing over the pseudonym of "Lucius Crassus," attacked it in the following strain:

The first thing in it, which excites our surprise, is the very extraordinary position, that though *Tripoli had declared war in form* against the United States, and had enforced it by actual hostility, yet that there was not power, for want of *the sanction of Congress*, to capture and detain her crews.

When the newspapers informed us that one of these cruisers, after being subdued in a bloody conflict, had been liberated and permitted quietly to return home, the imagination was perplexed to divine the reason. The conjecture naturally was, that pursuing a policy too refined perhaps for barbarians, it was intended, by that measure, to give the enemy a strong impression of our magnanimity and humanity. No one dreamt of a scruple as to the *right* to seize and detain the armed vessel of an open and avowed foe, vanquished in battle. The enigma is now solved, and we are presented with one of the most singular paradoxes ever advanced by a man claiming the character of a statesman. When analyzed, it amounts to nothing less than this, that *between* two nations there may exist a state of complete war on the one side—of peace on the other.

War, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other. This is a rule of natural law; a necessary and inevitable consequence of the state of war. This state between two nations is completely produced by the act of one—it requires no concurrent act of the other. It is impossible to conceive the idea, that one nation can be in full war with another, and this other not in the same state with respect to its adversary. The moment that two nations are, in an absolute sense, at war, the public force of each may exercise every act of hostility, which the general laws of war authorize, against the

persons and property of the other. As respects this conclusion, the distinction between offensive and defensive war makes no difference. That distinction is only material to discriminate the aggressing nation from that which defends itself against attack.—The war is offensive on the part of the state which makes it; on the opposite side it is defensive: but the rights of both, as to the measure of hostility, are equal.

It will be readily allowed, that the constitution of a particular country may limit the organ, charged with the direction of the public force, in the use or application of that force, even in time of actual war: but nothing short of the strongest negative words, of the most express prohibitions, can be admitted to restrain that organ from so employing it, as to derive the fruits of actual victory, by making prisoners of the persons and detaining the property of a vanquished enemy. Our Constitution, happily, is not chargeable with so great an absurdity. The framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and convenience. That instrument has only provided affirmatively, that, "The Congress shall have power to declare War"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War.* But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war,* and any declaration on the part of Congress is nugatory; it is at least unnecessary. This inference is clear in principle, and has the sanction of established practice. It is clear in principle, because it is self-evident, that a declaration by one nation against another, produces at once a complete state of war between both; and that no declaration on the other side can at all vary their relative situation; and in practice, it is well known, that nothing is more common than when war is declared by one party, to prosecute mutual hostilities without a declaration by the other.

The doctrine of the Message includes the strange absurdity, that without a declaration of war by Congress, our public force may destroy the life, but may not restrain the liberty, or seize the property of an enemy. This was exemplified in the very instance of the Tripolitan corsair. A number of her crew were slaughtered in the combat, and after she was subdued, she was set free with the remainder. But it may perhaps be said, that she was the assailant, and that resistance was an act of mere defence and self-preservation. Let us then pursue the matter a step further. Our ships had blockaded the Tripolitan Admiral in the Bay of Gibraltar; suppose he had attempted to make his way out, without first firing upon them; if permitted to do it, the blockade was a farce; if hindered by force, this would have amounted to more than a mere act of defence: and if a combat had ensued, we should then have seen a perfect illustration of the unintelligible right, to take the life but not to abridge the liberty, or capture the property of an enemy. Let us suppose an invasion of our territory, previous to a declaration of war by Congress. The principle avowed in the Message, would authorize our troops to kill those of the invader, if they should come within reach of their bayonets, perhaps to drive them into the sea, and drown them; but not to disable them from doing harm, by the milder process of making them prisoners, and sending them into confinement. Perhaps it may be replied, that the same end would be answered by disarming, and leaving them to starve. The merit of such an argument would be complete by adding, that should they not be famished, before the arrival of their ships with a fresh supply of arms, we might then, if able, disarm them a second time, and send them on board their fleet, to return safely home. . . .

Who could restrain the laugh of derision at positions so preposterous, were it not for the reflection that in the first magistrate of our country, they cast a blemish on our national character? What will the world think of the fold when such is the shepherd?[8]

[8] *Works,* VII, pp. 745-8.

The same question was brought up again forty-five years later, when President Polk, in his Message of May 11, 1846, wrote:

After reiterated menaces, Mexico has passed the boundary of the United States, has invaded our territory and shed American blood upon the American soil. She has proclaimed that hostilities have commenced, and that the two nations are now at war.

As war exists, and, notwithstanding all our efforts to avoid it, exists by the act of Mexico herself, we are called upon by every consideration of duty and patriotism to vindicate with decision the honor, the rights, and the interests of our country.

In further vindication of our rights and defense of our territory, I invoke the prompt action of Congress to recognize the existence of the war, and to place at the disposition of the Executive the means of prosecuting the war with vigor, and thus hastening the restoration of peace.[9]

When this message reached the Senate the portion of it just quoted was at once assailed by Calhoun, on the ground that,

in the sense of the constitution war could be declared only by Congress; that it was only through the exercise of the authority of Congress that that state of things called "war" could be announced to the country and the world. . . . [He] said he would now appeal to the Senate, and ask if there was a man there who could believe, on the only document which they had—how authentic he knew not—that there existed war, in its proper and constitutional form, between the two countries? War must be made by the sovereign authority, which, in this case, were the Mexican Congress, on the one side, and the American Congress, on the other. The President of Mexico could not make war. It could only be done by

[9] Richardson, IV, pp. 442-3.

the two countries. Even if the two Presidents had declared war, the nations could disavow the act; and he called on the Senate to reflect upon the position in which they would be placed in case they made a declaration of war, and in due course of time there should come a disavowal on the part of Mexico.[10]

Cass of Michigan joined issue with Calhoun on the constitutional question, as follows:

There can be no hostilities undertaken by a government which do not constitute a state of war. War is a fact, sir, created by an effort made by one nation to injure another. One party may make a war, though it requires two parties to make a peace. The Senator from South Carolina contends that as Congress alone have a right, by the constitution, to declare a war, therefore there can be no war till it is thus declared. There is here a very obvious error. It is certain that Congress alone has the right to declare war. That is, there is no other authority in the United States, which, on our part, can change the relations of peace with another country into those of war. No authority but Congress can commence an aggressive war. But another country can commence a war against us without the co-operation of Congress. Another country can, at its pleasure, terminate the relations of peace with us, and substitute for these the relations of war, with their legitimate consequences. War may be commenced with or without a previous declaration. It may be commenced by a manifesto announcing the fact to the world, or by hostile attacks by land or sea. The honorable Senator from Virginia (Mr. Pennybacker) has well stated the modern practice of nations on this subject. He has referred both to facts and authorities, showing that acts of hostility, with or without a public declaration, constitute a state of war. It was thus the war of 1756 was commenced. It was thus, I believe, was commenced the war between England and France during our Revolution. The peace

[10] Benton, XV, pp. 491, 500.

of Amiens was terminated by an act of hostility, and not by a public manifesto. The capture of the Danish fleet was preceded by no declaration of the intentions of the British Government. Our own war of 1812 was declared on the 18th of June. The manifesto of the Prince Regent declaring war against us, was not issued till January 10, 1813. And yet long before that our borders had been penetrated in many directions, an army had been subdued and captured, and the whole territory of Michigan had been overrun and seized. All these facts prove conclusively that it is a state of hostilities that produces war, and not any formal declaration. Any other construction would lead to this practical absurdity. England, for instance, by an act of hostility or by a public declaration, announces that she is at war with us. If the view, presented by the honorable Senator from South Carolina, is correct, we are not at war with her till Congress has acted upon the subject. One party, then, is at war, while the other is at peace; or, at any rate, in this new intermediate state of hostilities, before unknown to the world. Now, sir, it is very clear that Mexico is at war with us, we at war with her. If she terminates the peaceful relations between two countries, they are terminated whether we consent or not. The new state of things thus created, does not depend upon the will of Congress. The two nations are at war, because one of them has chosen to place them both in that attitude.[11]

The same question was raised again by President Lincoln's action in proclaiming a blockade of the Southern ports in April, 1861, without awaiting the sanction of Congress, which was then not in session. Blockade is known to International Law only as an incident of public war, and so when some British vessels were captured on the ground that they were attempting an infraction of the blockade which had been

[11] *Ib.*, p. 503.

proclaimed by the President, it became necessary for the courts to determine the validity of this blockade. Sustaining the President's action, the majority opinion of the Supreme Court, written by Justice Grier, said:

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the Constitution. The Constitution confers on the President the whole Executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the Acts of Congress of February 28, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral." Lord Stowell (1 Dodson, 247) observes, "It is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13, 1846, which recognized "a state of war as

existing by the act of the Republic of Mexico." This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact. . . .

Whether the President, in fulfilling his duties as Commander-in-Chief in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions, as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decision and acts of the political department of the Government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.[12]

A powerful minority of the Court for whom Justice Nelson spoke argued that only a declaration by Congress could produce a status of war for the United States.[13] It should be noticed, too, that all so-called "declarations of war" by Congress have adhered to the form followed in the first of them, that of 1812, which was phrased as follows:

[12] 2 Black 635, 668. See also Dana's argument, *ib.*, pp. 659-60.
[13] *Ib.*, p. 688 ff.

Whereas war in fact now exists between Great Britain and the United States, be it therefore enacted that the President of the United States be and he is hereby authorized to carry on the same with the forces of the nation both by sea and land and to grant letters of marque and reprisal.[14]

In his War Message of April 2 President Wilson conforms to this precedent. He advised that

the Congress declare the recent course of the German Government to be, in fact, nothing less than war against the Government of the United States; that it formally accept the status of belligerent which has thus been thrust upon it, and that it take immediate steps, not only to put the country in a more thorough state of defense, but also to exert all its power and employ all its resources to bring the Government of the German Empire to terms and end the war.[15]

It thus appears that the power of Congress to declare war has in actual exercise been the power to recognize an existing state of war, but that the President alone may also exercise this power, at least in the case of invasion or of insurrection. The question possibly remains whether the President may recognize a foreign war not attended by invasion of American territory, and by his act produce the juridical results of a status of war, namely, the legalization of blockades at International Law, the termination of treaties with the other belligerent, the closing of the courts to the citizens or subjects of the other belligerent, etc.

[14] The act was entitled "An Act *declaring* War between Great Britain and her Dependencies, and the United States and Their Territories," Benton, IV, p. 560.

[15] *New York Times*, Apr. 8, 1917.

The lines of reasoning employed in the Prize Cases would seem to answer this question affirmatively.

3—But not only may the President "recognize" a state of war in certain cases, he may also, at least in the absence of restrictive legislation, employ the forces of the United States to perform what are technically acts of war in protection of American rights abroad. A famous instance in this connection is the case of Martin Koszta, which is referred to by the United States Supreme Court in the Neagle case, above cited, in the following terms:

> One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop-of-war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress,

who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?[16]

The date of this episode was 1853. A year later occurred the bombardment of Greytown, Nicaragua, by Lieutenant Hollins of the U. S. S. Cyane, in default of reparation which Hollins had demanded from the local authorities for an attack by a mob on the United States consul. Hollins's action was defended by President Pierce in his annual Message of this year without reference to the constitutional question:

When the Cyane was ordered to Central America, it was confidently hoped and expected that no occasion would arise for "a resort to violence and destruction of property and loss of life." Instructions to that effect were given to her commander; and no extreme act would have been requisite had not the people themselves, by their extraordinary conduct in the affair, frustrated all the possible mild measures for obtaining satisfaction. A withdrawal from the place, the object of his visit entirely defeated, would under the circumstances in which the commander of the Cyane found himself have been absolute abandonment of all claim of our citizens for indemnification and submissive acquiescence in national indignity. It would have encouraged in these lawless men a spirit of insolence and rapine most dangerous to the lives and property of our citizens at Punta Arenas, and probably emboldened them to grasp at the treasures and valuable merchandise continually passing over the Nicaragua route. It certainly would have been most satisfactory to me if the objects of the Cyane's mission could have been consummated without any act of public force, but the arrogant contumacy of the offenders ren-

[16] 135 U. S. 1, 64.

dered it impossible to avoid the alternative either to break up their establishment or to leave them impressed with the idea that they might persevere with impunity in a career of insolence and plunder.[17]

Five or six years later, upon his return to the United States, Hollins was sued in the lower Federal Court by one Durand for the value of property which had been destroyed in the bombardment. His defense was based upon the orders of the President and Secretary of Navy, and he was entirely vindicated by Justice Nelson, who said:

As the Executive head of the nation, the President is made the only legitimate organ of the General Government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole Executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different Departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a Department of State and a Department of the Navy.

Now, as respects the interposition of the Executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of Government, the citizen abroad is as much entitled

[17] Richardson, V, p. 284.

to protection as the citizen at home. The great object and duty of Government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any Government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.[18]

During Buchanan's administration the power of the President in the field under survey was brought under discussion repeatedly. In his Message of December, 1858, he refers to the situation then existing in China, as follows:

You were informed by my last annual message that our minister had been instructed to occupy a neutral position in the hostilities conducted by Great Britain and France against Canton. He was, however, at the same time directed to cooperate cordially with the British and French ministers in all peaceful measures to secure by treaty those just concessions to foreign commerce which the nations of the world had a right to demand. It was impossible for me to proceed further than this on my own authority without usurping the war-making power, which under the Constitution belongs exclusively to Congress.

Besides, after a careful examination of the nature and extent of our grievances, I did not believe they were of such a pressing and aggravated character as would have justified Congress in declaring war against the Chinese Empire without first making another earnest attempt to adjust them by peaceful negotiation. I was the more inclined to this opinion because of the severe chastisement which had then but recently been inflicted upon the Chinese by our squadron in the capture and destruction of the Barrier forts to avenge an alleged insult to our flag.[19]

[18] 4 Blatchford 451, 454.

[19] Richardson V,, p. 506.

The attack by our vessels on the Barrier forts here referred to was without Congressional authorization; yet Buchanan apparently regards it as having been allowable. His point of view is made somewhat clearer by the following extract from a note of Mr. Cass, then Secretary of State, to Lord Napier, the British minister at Washington, which is dated April 10, 1857:

> This proposition, looking to a participation by the United States in the existing hostilities against China, makes it proper to remind your lordship that, under the Constitution of the United States, the executive branch of this Government is not the war making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken.
>
> Our naval officers have the right—it is their duty, indeed—to employ the forces under their command, not only in self-defense, but for the protection of the persons and property of our citizens when exposed to acts of lawless outrage, and this they have done both in China and elsewhere, and will do again when necessary. But military expeditions into the Chinese territory can not be undertaken without the authority of the National Legislature.[20]

In this same message of December, 1858, Buchanan also refers to "the claim on the part of Great Britain forceably to visit American vessels on the high seas in time of peace," and the despatch of a naval force to Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation."

The distinction here seems to be between "aggres-

[20] Moore's *Digest*, VII, p. 164.

sive" and "defensive" action, yet when he wished to protect American citizens in the interior of Nicaragua, Mexico, and New Grenada, and in their rights of transit across the Isthmuses of Panama and Tehuantepec, Buchanan thought it necessary to appeal to Congress and placed the necessity on constitutional grounds. Thus, in a special message, dated February 18, 1859, he wrote as follows:

The Republics south of the United States on this continent have, unfortunately, been frequently in a state of revolution and civil war ever since they achieved their independence. As one or the other party has prevailed and obtained possession of the ports open to foreign commerce, they have seized and confiscated American vessels and their cargoes in an arbitrary and lawless manner and exacted money from American citizens by forced loans and other violent proceedings to enable them to carry on hostilities. The executive governments of Great Britain, France, and other countries, possessing the war-making power, can promptly employ the necessary means to enforce immediate redress for similar outrages upon their subjects. Not so the executive government of the United States.

If the President orders a vessel of war to any of these ports to demand prompt redress for outrages committed, the offending parties are well aware that in case of refusal the commander can do no more than remonstrate. He can resort to no hostile act. The question must then be referred to diplomacy, and in many cases adequate redress can never be obtained. Thus American citizens are deprived of the same protection under the flag of their country which the subjects of other nations enjoy. The remedy for this state of things can only be supplied by Congress, since the Constitution has confided to that body alone the power to make war. Without the authority of Congress the Executive can not lawfully direct any force, however near it may be to the scene of diffi-

culty, to enter the territory of Mexico, Nicaragua, or New Granada for the purpose of defending the persons and property of American citizens, even though they may be violently assailed whilst passing in peaceful transit over the Tehauntepec, Nicaragua, or Panama routes. He can not, without transcending his constitutional power, direct a gun to be fired into a port or land a seaman or marine to protect the lives of our countrymen on shore or to obtain redress for a recent outrage on their property. The banditti which infest our neighboring Republic of Mexico, always claiming to belong to one or the other of the hostile parties, might make a sudden descent on Vera Cruz or on the Tehauntepec route, and he would have no power to employ the force on shipboard in the vicinity for their relief, either to prevent the plunder of our merchants or the destruction of the transit.

In reference to countries where the local authorities are strong enough to enforce the laws, the difficulty here indicated can seldom happen; but where this is not the case and the local authorities do not possess the physical power, even if they possess the will, to protect our citizens within their limits recent experience has shown that the American Executive should itself be authorized to render this protection. Such a grant of authority, thus limited in its extent, could in no just sense be regarded as a transfer of the war-making power to the Executive, but only as an appropriate exercise of that power by the body to whom it exclusively belongs. The riot at Panama in 1856, in which a great number of our citizens lost their lives, furnishes a pointed illustration of the necessity which may arise for the exertion of this authority.

I therefore earnestly recommend to Congress, on whom the responsibility exclusively rests, to pass a law before their adjournment conferring on the President the power to protect the lives and property of American citizens in the cases which I have indicated, under such restrictions and conditions as they may deem advisable. The knowledge that such a law exists would of itself go far to prevent the outrages which it is intended to redress and to render the employment of force unnecessary.

Without this the President may be placed in a painful position before the meeting of the next Congress. In the present disturbed condition of Mexico and one or more of the other Republics south of us, no person can foresee what occurrences may take place before that period. In case of emergency, our citizens, seeing that they do not enjoy the same protection with subjects of European Governments, will have just cause to complain. On the other hand, should the Executive interpose, and especially should the result prove disastrous and valuable lives be lost, he might subject himself to severe censure for having assumed a power not confided to him by the Constitution. It is to guard against this contingency that I now appeal to Congress.[21]

But not only did Congress not comply with the request, but it was argued that it could not do so validly. I quote from the Message of December, 1859, where the objection is stated and answered by the President, as follows:

The chief objection urged against the grant of this authority is that Congress by conferring it would violate the Constitution; that it would be a transfer of the war-making, or, strictly speaking, the war-declaring, power to the Executive. If this were well founded, it would, of course, be conclusive. A very brief examination, however, will place this objection at rest.

Congress possess the sole and exclusive power under the Constitution "to declare war." They alone can "raise and support armies" and "provide and maintain a navy." But after Congress shall have declared war and provided the force necessary to carry it on the President, as Commander in Chief of the Army and Navy, can alone employ this force in making war against the enemy. This is the plain language, and history proves that it was the well-known intention of the framers, of the Constitution.

It will not be denied that the general "power to de-

[21] Richardson, V, pp. 539-40.

clare war" is without limitation and embraces within itself not only what writers on the law of nations term a public or perfect war, but also an imperfect war, and, in short, every species of hostility, however confined or limited. Without the authority of Congress the President can not fire a hostile gun in any case except to repel the attacks of an enemy. It will not be doubted that under this power Congress could, if they thought proper, authorize the President to employ the force at his command to seize a vessel belonging to an American citizen which had been illegally and unjustly captured in a foreign port and restore it to its owner. But can Congress only act after the fact, after the mischief has been done? Have they no power to confer upon the President the authority in advance to furnish instant redress should such a case afterwards occur? Must they wait until the mischief has been done, and can they apply the remedy only when it is too late? To confer this authority to meet future cases under circumstances strictly specified is as clearly within the war-declaring power as such an authority conferred upon the President by act of Congress after the deed had been done. In the progress of a great nation many exigencies must arise imperatively requiring that Congress should authorize the President to act promptly on certain conditions which may or may not afterwards arise. Our history has already presented a number of such cases.[22]

One of the most remarkable episodes of recent years illustrative of the President's power and duty to protect American rights abroad is furnished by President McKinley's dispatch of a naval force and an army of some five thousand men, under General Chaffee, to China in 1900, at the time of the Boxer Movement. In his annual Message the President referred to his action thus:

[22] *Ib.*, pp. 569-70.

Our declared aims involved no war against the Chinese nation. We adhered to the legitimate office of rescuing the imperiled legation, obtaining redress for wrongs already suffered, securing wherever possible the safety of American life and property in China, and preventing a spread of the disorders or their recurrence.

The expedition took place in cooperation with like expeditions sent out by several European countries, whose plenipotentiaries were joined by the American minister to China in pressing the Protocol of September 7, 1901, upon the Chinese Imperial Government. This instrument detailed certain acts of reparation by the Chinese authorities for the injuries that foreign powers, their citizens and subjects, had suffered from the uprising, among other things the payment of an indemnity. The protocol was ratified for the United States by the President alone, without reference to the Senate.[23]

[23] See Moore's *Digest*, V, pp. 476-533, *passim*. See a reference in Mr. Taft's *The Presidency*, p. 88, to a "landing of marines and quite a campaign" in Nicaragua which occurred during his administration. Mr. Roosevelt's dispatch of the fleet around the world in his second administration did not involve hostile consequences, but affords a remarkable example of the possibilities of the powers of the President as Commander-in-Chief. Reference should also be made at this point to the landing of American troops at Vera Cruz in the summer of 1914, to punish Huerta for his refusal to render what the President thought a proper apology for an affront to the American flag and a violation of American rights. "This act," in the words of President Taft, "was committed before authority was given by Congress, but the necessary authority had passed one house, and was passing another at the time, and the question as to the right of the Executive to take action without Congressional authority was avoided by full and immediate ratification."

On February 25, 1917, President Wilson went before Congress, and in view of the renewal by Germany of ruthless submarine warfare, asked that body to authorize him

to supply our merchant ships with defensive arms should that become necessary, and with the means of using them, and to employ any other instrumentalities or methods that may be necessary and adequate to protect our ships and our people in their legitimate and peaceful pursuits on the seas.[23a]

At the same time the President further said:

No doubt I already possess that authority without special warrant of law, by the plain implication of my constitutional duties and powers; but I prefer in the present circumstances not to act upon general implication. I wish to feel that the authority and the power of the Congress are behind me in whatever it may become necessary for me to do. We are jointly the servants of the people and must act together and in their spirit, so far as we can divine and interpret it.[24]

Thereupon the following bill was introduced into the House of Representatives from the Foreign Affairs Committee:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the President of the United States be and hereby is authorized and empowered to supply merchant ships, the property of citizens of the United States and bearing American registry, with defensive arms, should it in his judgment become necessary for him to do so, and also with the necessary ammuni-

[23a] *New York Times*, Feb. 27, 1917.
[24] *Ib.*

tion and means of making use of them in defense against unlawful attack; and that he be and is hereby authorized and empowered to employ such other instrumentalities and methods as may in his judgment and discretion seem necessary and adequate to protect such ships and the citizens of the United States in their lawful and peaceful pursuits on the high seas.[25]

The measure passed the House with the usual expedition. In the Senate it met with opposition which eventually, because of the termination of Congress, proved fatal to it. On the constitutional question, the opponents of the measure took the position that it was invalid as comprising a delegation by Congress of its war declaring power. Said Senator Stone of Missouri:

I believe the bill to be not only violative of the Constitution—destructive of one of the most important powers vested in the Congress, the war-making power—but that its passage would set a precedent fraught with future danger to our form of government and to public liberty. . . .

The Constitution vests the war-making power alone in the Congress. It is a power the Congress is not at liberty to delegate. Moreover, I am personally unwilling to part with my constitutional responsibility as a Senator to express my judgment upon the issue of war whenever and however it may be presented. I believe this law would contravene the Constitution. . . .

The Congress would have abdicated and surrendered in advance all chance of passing upon the questions adjudicated by the President—leaving everything to him. They would have surrendered their constitutional right and lost their opportunity to determine whether or not the facts upon which the President acted would justify a declaration of war or warrant the inauguration of war by a definite act of war. Under this bill all such ques-

[25] *Ib.*

tions would be left to the President alone. The Congress would have already divested themselves even of the poor privilege of saying that they approved or disapproved of the President's course. After the beginning of war, it would certainly be too late to speak. They might find the country in the midst of a war begun by the President under colorable authority, and it would then, as I have said, be too late for Congress to disapprove or reject, and any attempt to do so would be fruitless. All they could do would be to approve. In the nature of things they could not disapprove. Being in war, we would have no other alternative but to go on and fight it out to the bitter end. Would any President surrender his constitutional powers in that way to the Congress? Would you have him do so? Be not deceived, Senators; this bill, if enacted, would confer power upon the President to initiate war, if he should so desire or determine, and to do that supremely solemn thing without first submitting the choice of war or peace to the Congress.[26]

Senator Stone also argued that inasmuch as the practice of a formal declaration of war had fallen into disuse, Congress must, if it would retain any authority over the subject of war making at all, take the position "that nothing can be done to inaugurate or initiate war until Congress first authorizes it."

As to the President's power in the absence of authorization by Congress, Senator Stone said:

Mr. President, it has been argued here that the President of the United States has constitutional power to do the very things this bill would authorize, whether the bill be enacted into law or not. It is said that he has implied constitutional power ample for this purpose. If that be so, would it not be a work of supererogation for the Congress to grant the President an authority he already possesses by a higher title? But I do not agree that the

[26] *Record*, 64 Cong., 2 Sess., pp. 5895-6.

President has any such constitutional power. The very fact that you seek to vest him with this statutory power is proof that you do not yourselves believe in this claim put forth that he is already invested with adequate constitutional power to do the things you would have him do.

He, the President—"shall take care that the laws be faithfully executed."

That is the clause of the Constitution upon which this claim is predicated that these implied powers are vested in the President. What is the meaning of the term "he shall take care that the laws be faithfully executed"? I can answer that best by illustrations or by example. For example—he must execute the judgments and decrees of the courts of the United States, and use force if necessary when they can not be executed in the ordinary course of judicial procedure, for he is at the head of the executive department. It is his duty to preserve the domestic public order within the Federal jurisdiction. It is his duty to protect the mails of the United States from lawless interference; to prevent the violation of our immigration laws, and so on and so forth. With respect to all such matters the power and duty of the President are plain. I think that that is substantially the scope and meaning of this clause of the Constitution. I can not consent that this clause confers, or was ever intended to confer, power upon the President to determine an issue between this Nation and some other sovereignty—an issue involving questions of international law—and to authorize him to settle that law for himself, and then proceed to employ the Army and Navy to enforce his decision. A contrary view would clearly place the war making power in the hands of the President.[27]

On March 12 the Secretary of State gave out a statement to all foreign legations in Washington, saying that, in view of the renewal by Germany of unrestricted submarine warfare,

[27] *Ib.*, pp. 5901-2.

the Government of the United States has determined to place on all American merchant vessels sailing through the barred areas an armed guard for the protection of the vessels and the lives of the persons on board.[28]

I conclude that the Presidential power under survey is somewhat analogous to the so-called right of self-preservation at International Law. Theoretically the power is a defensive power and reserved for grave and sudden emergencies. Practically the limit to it is to be found in the powers of Congress and public opinion.

4—The right of the President to adopt warlike measures, in the absence of legislation, to protect "inchoate" interests of the United States abroad was first discussed in 1844. In negotiating this year for the annexation of Texas to the United States President Houston of that republic demanded of President Tyler that the latter should so dispose the naval and military forces of the United States as to afford Texas adequate protection against the danger of a Mexican invasion, in the interval between the signature of the treaty and its final ratification. Tyler complied, and upon the passage by the Senate of a resolution of inquiry, defended his course thus:

It is due to myself that I should declare it as my opinion that the United States having by the treaty of annexation acquired a title to Texas which requires only the action of the Senate to perfect it, no other power could be permitted to invade and by force of arms to

[28] The President might undoubtedly, had he chosen, have detailed war vessels to escort American merchantmen through the barred areas.

possess itself of any portion of the territory of Texas pending your deliberations upon the treaty without placing itself in an hostile attitude to the United States and justifying the employment of any military means at our disposal to drive back the invasion.[29]

Benton, who had moved the resolution of inquiry and bitterly opposed the treaty, answered as follows:

This is a reversal of the power of the Senate, and a reading backwards of the constitution. It makes an act of defeasance from the Senate necessary to undo a treaty which the President sends to us, instead of requiring our assent to give it validity. It assumes Texas to be in the Union, and protected by our constitution from invasion or insurrection, like any part of the existing States or Territories; and to remain so till the Senate puts her out by rejecting the treaty! This, indeed, is not merely reading, but spelling the constitution backwards! it is reversing the functions of the Senate and making it a nullifying, instead of a ratifying body. We are to dissent, instead of consent; and until our dissent is declared, the treaty is to be acted on; and that, even in the article of war! Besides reversing our constitution, this reading of the Senate's functions would lead to every folly, and to scenes worthy of bedlam: for, the execution of the treaty commencing with its signature, must go on till the Senate rejects it. Apply this to ordinary treaties, where civil acts only are to be performed, and still folly and mischief would result from suddenly stopping what had been prematurely begun. But apply it to extraordinary treaties, like the present one, where a war is adopted, and its prosecution instantly assumed: apply the new doctrine to such a treaty as this, and see how it works. Why, when the battle was half fought—when soldiers were falling in the field, and merchants were flying from the country—when blood was flowing and

[29] Richardson, IV, pp. 317-8. For the crucial documents in the correspondence between Texas and the United States, see *Globe,* XIII, Appendix, p. 572.

property lost, a messenger might come staving up, with a peace-warrant to arrest the combatants. The living might indeed be arrested, and further killing stopped; but who could restore the dead to life? Who could repair the loss of the ruined merchants? What art could hide the shame of such bedlamite conduct?[30]

Tyler's efforts to annex Texas had their counterpart in 1871, in President Grant's efforts to secure Santo Domingo for the United States. The annexation was arranged for in a treaty which was negotiated by one of Grant's private secretaries with Buenaventura Baez, who was at the moment Dictator of the revolution-ridden Republic. Now Baez was fearful of being overturned at any time by an internal insurrection and was also apprehensive of an attack from Hayti. At his request, accordingly, Grant sent a strong naval armament to the island, with instructions to prevent, by force if necessary, any hostile move by Hayti, and also, so far as possible, any internal uprising. Thus far the parallel to Tyler's earlier course is fairly clear, but at one point Grant went considerably beyond his predecessor, for he continued in force the orders just referred to even after the treaty with Santo Domingo had been formally rejected by the Senate. The outcome was a ferocious assault upon his whole Dominican policy, which was led by Sumner, but was ably supported by Carl Schurz, then Senator from Missouri.

So far as it rested on constitutional grounds, Sumner's position was stated in the following resolutions, which were offered by him some months after the treaty had been acted on:

[30] *Globe, loc. cit.*, pp. 498-9.

Resolved, That under the Constitution of the United States the power to declare war is placed under the safeguard of an act of Congress; that the President alone cannot declare war; that this is a peculiar principle of our Government by which it is distinguished from monarchical Governments, where power to declare war, as also the treaty-making power, is in the Executive alone; that in pursuance of this principle the President cannot, by any act of his own, as by an unratified treaty, obtain any such power, and thus divest Congress of its control; and that therefore the employment of the Navy without the authority of Congress in acts of hostility against a friendly foreign nation, or in belligerent intervention in the affairs of a foreign nation, is an infraction of the Constitution of the United States and a usurpation of power not conferred upon the President.

Resolved, That while the President, without any previous declaration of war by act of Congress, may defend the country against invasion by foreign enemies, he is not justified in exercising the same power in an outlying foreign island, which has not yet become part of the United States; that a title under an unratified treaty is at most inchoate and contingent, while it is created by the President alone, in which respect it differs from any such title created by act of Congress; and since it is created by the President alone, without the support of law, whether in legislation or a ratified treaty, the employment of the Navy in the maintenance of the Government there is without any excuse of national defense, as also without any excuse of a previous declaration of war by Congress.[31]

Schurz developed the same position in argument on the floor, thus:

As I have said, I repeat that the President in ordering the naval commanders of the United States to capture and destroy by force, without being attacked, without our territory being invaded by force, the vessels of a

[31] *Globe,* 42 Cong., 1 Sess., Pt. I, p. 294.

nation with whom the United States were at peace in a contingency arbitrarily defined by himself, did usurp the war-making power of Congress; and I repeat it. . . .

Now let us see what Senators have to say to controvert this argument or to weaken its force. . . .

Gentlemen claim that the President, of whom nobody pretends that he possesses the power to initiate a war of his own motion under the Constitution, still does possess the power, by making a treaty, to create an inchoate right of the United States in some foreign territory, and having by his own arbitrary act created that inchoate right, he has the power at his own arbitrary pleasure, without authority from Congress, to commit acts of war for the enforcement of the inchoate right. In other words, it is claimed that the President by an act performed by himself at his own arbitrary pleasure, in conjunction with a foreign Government, may obtain for himself alone the war making power, which the Constitution expressly vests in Congress. I look upon this as perhaps the hugest absurdity, the most audacious preposterosity, the most mischievous, dangerous, and anti-republican doctrine that ever was broached on the floor of the Senate. When we hear advocated in the American Senate so wild a heresy, that the President, by a mere sleight of hand, may steal from Congress the war-making power, does it not occur to you, Senators, that it is at last time that such theories and such acts should be sifted to the bottom by independent men?[32]

The President's defense was undertaken by Senator Harlan of Iowa along the following lines:

I shall now attempt to proceed with the line of precedents I began to name. When we were disputing with Great Britain about our northeastern boundary, I remember we arrayed some military forces in that vicinity. When we were engaged in a controversy with the same Government on the northwestern boundary, I remember that the disputed territory was taken possession of by

[32] *Ib.*, Appendix, p. 52.

the troops of the United States without any formal declaration of war. I have heard something of the bombardment of Greytown by the Navy of the United States, and I have never seen any declaration of war to justify that act of hostility. That was done, it is true, under a Democratic Administration. . . .

I have heard something of the bombardment of the ports of Japan by the combined Navies of the United States, France, and England, which, as I am informed by my honorable friend from Vermont (Mr. Edmunds), was not condemned, and we took our share of the indemnity thus secured from the Government of Japan, amounting, I believe, to some $3,000,000, still, I am told, in the Treasury of the United States; and yet there was no formal declaration of war to justify it. I have heard also, I think, of a naval engagement in the waters of China by the combined naval forces of the United States, England, and France, and our part of the proceeds of the settlement of that controversy was duly paid to our Government; a part of it has been distributed to American claimants, and the remainder, now in the Treasury, has been the subject of a good deal of reflection on the part of the honorable Senator from Massachusetts, during the preceding session of Congress, in trying to devise some fit mode of disposing of it. That engagement was not preceded, as far as I have been informed, by any declaration of war by the Congress of the United States.

Now, how do you account for all these acts of hostility, not threats, not diplomatic dispatches merely, not a declaration, if our rights shall be invaded we would defend them, but actual war; not a war of words, but a war made with armies and navies, taking possession of disputed and hostile territory, fighting pitched battles and bombarding cities; war made with guns and solid shot and shell, where we compelled the vanquished to pay indemnity, and put it into our Treasury, and yet no declaration of war? How does it happen that these two Senators, in their zeal to defend the Constitution of the United States, can find but one case worthy of their logic, their great learning, and their eloquence?[33]

[33] *Ib.*, p. 65.

Harlan's argument from precedent at least demonstrated the futility of attempting to confine the President's protective function to the mere duty of repelling invasion or immediate physical attack, nor do Schurz and Sumner appear to have attempted to meet him upon this issue. The only constructive principle offered by either of these gentlemen was their suggestion of a difference between "inchoate" and "contingent" interests and rights of full legal status. Most, if not all, of the precedents brought forward by Harlan could have been distinguished, it would seem, from the case in hand in this manner.

Yet later events have gone far to sweep away even this distinction, at least as to that geographical region where American "interests" are most sensitive. I refer especially to President Roosevelt's action in preventing an invasion of Panama by Colombia in the autumn of 1903, and the present Administration's Caribbean policy, which to date has involved the active employment of the forces of the United States, without special authorization by Congress, in Nicaragua, Hayti, and Santo Domingo. In the last named republic, moreover, American forces instituted, on November 29, 1916, a military occupation "exercising military government" pending the restoration of civil order, which action was justified by appeal to Article III of the Treaty of 1907 with Santo Domingo. It is interesting to note, therefore, that a similar article appears in the Treaty of 1916 with Nicaragua, while articles providing specifically for intervention by our Government in their affairs, in certain contingencies,

are contained in existing treaties with Cuba, Panama and Hayti. It thus appears that Grant's action in 1871 was forerunner of an important development in Presidential war making, which, however, has been confined in actual application to the states of the Caribbean and which has today been generally regularized by treaty arrangements.[34]

5—In the foregoing pages I have had frequent occasion to refer to "political questions." I shall now explain this reference. Incidentally to the discharge of his diplomatic functions the President—and for that matter, Congress too, when its action touches foreign relations—finds it necessary to decide many questions of a juristic character, questions involving the interpretation of treaties and other bilateral agreements, or even of the Law of Nations. Now it is the practice of the Court, when such determinations fall clearly within the diplomatic field, that is, are made with jurisdiction, to treat them not only as final but

[34] The treaty with Cuba referred to above was ratified July, 1904, and embodies the provisions of "the Platt Amendment." The intervention in Cuba in 1907 took place in pursuance of its provisions. The treaty with Panama, which was ratified in February, 1904, was modelled after the Cuban treaty. The Haytian treaty was ratified February 28, 1916. Article XIV of it reads: "Should the necessity occur, the United States will lend an efficient aid for the preservation of Haytian Independence and the maintenance of a government adequate for the protection of life, property and individual liberty." On the recent intervention in Santo Domingo, see Prof. P. M. Brown in *American Journal of International Law*, XI, 394 ff. I do not refer in the text to what occurred in 1916 along the Mexican border, as the President was in this instance but performing his constitutional duty of repelling invasion.

also as establishing binding rules for all future cases in which the same questions are raised collaterally. This is on the ground that such questions, involving as they do the opposing claims of sovereignties, are political rather than legal in their nature. The following cases afford illustration of political questions: In the case of Foster v. Neilson, the question was the validity of a grant made by the Spanish Government in 1804 of land lying to the east of the Mississippi River, and involved in this question was the further one whether the region between the Perdido and Mississippi Rivers belonged in 1804 to Spain or the United States. Marshall held that the Court was bound by the action of the political departments, the President and Congress, in claiming the land for the United States. He said:

> If those departments which are entrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature.[35]

The doctrine thus clearly stated was further amplified in the case of Williams v. The Suffolk Insurance Company. In this case the underwriters of a vessel

[35] 2 Peters 253, 308.

which had been confiscated by the Argentine Government for catching seals off the Falkland Islands contrary to that government's orders sought to escape liability by showing that the Argentinian government was the sovereign over these islands and that, accordingly, the vessel had been condemned for wilful disregard of legitimate authority. The Court decided against the company on the ground that the President had taken the position that the Falkland Islands were not a part of Argentina. It said:

> Can there be any doubt that when the executive branch of the government, which is charged with the foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. If this were not the rule cases might often arise in which, on most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise, and so destructive of national character.[36]

Other cases illustrating the same principle may be mentioned more briefly. In United States v. Palmer[37]

[36] 13 Peters 415, 420.

[37] 3 Wheaton 610.

the question was whether certain maritime captures by an unrecognized community constituted piracy. The Court, through Chief Justice Marshall, held that it must view any newly constituted community as it was viewed by the legislative and executive branches of the Government; and that since the Government had remained neutral in the war in question, acts of war authorized under the Law of Nations should not be considered as criminal by the Court. Thus the right to determine the boundaries of the country is a political function; also the right to determine what country is sovereign of a particular region; also the right to determine whether a community is entitled under International Law to be considered a belligerent or an independent state; also the right to determine who is the de jure or de facto ruler of a country;[38] also the right to determine whether a particular person is a duly accredited diplomatic agent to the United States;[39] also the right to determine how long a military occupation shall continue in fulfillment of the terms of a treaty;[40] also the right to determine whether a treaty is in effect or not, though doubtless an extinguished treaty could not be constitutionally renewed by tacit consent.[41]

This concept of political questions is important for this reason: It explains the lack which we have frequently noted of definite legal criteria for determining

[38] Jones v. U. S., 137 U. S. 202.

[39] In re Baiz, 135 U. S. 403.

[40] Neely v. Henkel, 180 U. S. 109.

[41] Terlinden v. Ames, 184 U. S. 270; Charlton v. Kelly, 229 U. S. 447.

the scope of the President's powers in the field of foreign relations and for deciding those contests for power in this field which have frequently occurred between the President and Congress or the President and the Senate. Such criteria lack because the courts have never had occasion to develop them, and they have never had occasion to develop them because of this concept.

PART THREE: THE GENERAL ISSUE AGAIN

CHAPTER V

A Senatorial Debate

In his "Autobiography" Mr. Roosevelt sets forth his theory of the Presidency thus:

The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power. In other words, I acted for the public welfare, I acted for the common well being of all our people, whenever

and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. I did not care a rap for the mere form and show of power; I cared immensely for the use that could be made of the substance.[1]

As he himself explains, he followed this theory not only in his domestic policy but in his foreign policy as well. His intervention in Panama in 1903, his agreement with Santo Domingo in 1905, his dispatch of an American representative to the Moroccan conference the same year, were all more or less connected with this theory, and they all aroused, especially in the Senate, more or less criticism. Finally, in the early days of 1906 Senator Bacon of Georgia and Senator Spooner of Wisconsin, aided by Senator Beveridge of Indiana, came to grapples over the constitutional issues raised by Mr. Roosevelt's aggressiveness. The debate which ensued, and of which the principal part is given below, reached, it will be perceived, the fundamental issue that more than a century before had divided "Pacificus" and "Helvidius":

SPEECH OF SENATOR SPOONER[2]

Mr. President: I take the floor upon this bill, not, however, to discuss it, but to present as briefly as I may my views upon another important subject. I am impelled to do this by recent debate here, more or less critical of the conduct of our foreign relations by the President, and under circumstances which, with great deference,

[1] *Op. cit.*, pp. 388-9.

[2] *Record*, 59 Cong., 1 Sess. (Vol. XL, Pt. 2), pp. 1417-21. This debate is also given in Professor Reinsch's *Readings in American Federal Government*, p. 81 ff.

I can not regard as constituting in any degree wise precedent.

Matters which are being considered by the Senate as an executive body have been debated in open legislative session. Fifteen years of service here has fully confirmed in me the impression, early formed after my advent in this body, that the consideration of treaties and all questions involving our foreign relations are best, save in very exceptional cases, conducted behind closed doors. This, of course, Mr. President, not because there is anything said or done which Senators would wish withheld from our own people, but because it is inevitable that in the perfect frankness which should characterize debate involving our foreign relations many things must be said, and are always said, which, in the public interest, ought not to be said in the hearing of other nations. I am clearly of the conviction, having regard to the peculiar relations created by the Constitution between the Senate and the Executive in respect to the exercise of the treaty-making power, that it is not a healthy precedent to establish, or one much to be followed, that involves public discussion of current foreign relations, including treaties. If indulged at all it ought to be done by a vote of the body since otherwise some feel justified in discussing phases which others feel not at liberty to debate. . . .

Mr. President, with great respect for those who differ from me, I deprecate the course which has been pursued. I believe that it is not a proper course to be pursued by the Senate in respect of our foreign relations, save in extraordinary circumstances, if at all. The Senate has nothing whatever to do with the *negotiation* of treaties or the conduct of our foreign intercourse and relations save the exercise of the one constitutional function of advice and consent which the Constitution requires as a precedent condition to the making of a treaty. Except as to the participation in the treaty-making power the Senate, under the Constitution, has obviously neither responsibilities nor power.

From the foundation of the Government it has been conceded in practice and in theory that the Constitution

vests the power of negotiation and the various phases—and they are multifarious—of the conduct of our foreign relations exclusively in the President. And, Mr. President, he does not exercise that constitutional power, nor can he be made to do it, under the tutelage or guardianship of the Senate or of the House or of the Senate and House combined.

Mr. TILLMAN. Will the Senator allow me to ask him a question?

Mr. SPOONER. Certainly.

Mr. TILLMAN. What interpretation does the Senator put upon the word "advice" in the Constitution? Can you give advice after a thing has been done?

Mr. SPOONER. Yes; you can give advice—

Mr. TILLMAN. As to whether or not a thing has been properly done, but you can not give advice after it has been done.

Mr. SPOONER. I will proceed to answer the question, if I am able.

The words "advice and consent of the Senate" are used in the Constitution with reference to the Senate's participation in the making of a treaty and are well translated by the word "ratification" popularly used in this connection. The President negotiates the treaty, to begin with. He may employ such agencies as he chooses to negotiate the proposed treaty. He may employ the ambassador, if there be one, or a minister or a chargé d'affaires, or he may use a person in private life whom he thinks by his skill or knowledge of the language or people of the country with which he is about to deal is best fitted to negotiate the treaty. He may issue to the agent chosen by him—and neither Congress nor the Senate has any concern as to whom he chooses—such instructions as seem to him wise. He may vary them from day to day. That is his concern. The Senate has no right to demand that he shall unfold to the world or to it, even in executive session, his instructions or the prospect or progress of the negotiation. I said "right." I use that word advisedly in order to illustrate what all men who have studied the subject are willing to concede

—that under the Constitution the absolute power of negotiation is in the President and the means of negotiation subject wholly to his will and his judgment.

When he shall have negotiated and sent his proposed treaty to the Senate the jurisdiction of this body attaches and its power begins. It may advise and consent, or it may refuse. And in the exercise of this function it is as independent of the Executive as he is independent of it in the matter of negotiation.

I do not deny the power of the Senate either in legislative session or in executive session—that is a question of propriety—to pass a resolution expressive of its opinion as to matters of foreign policy. But if it is passed by the Senate or by the House or by both Houses, it is beyond any possible question purely advisory, and not in the slightest degree binding in law or conscience upon the President. It is easy to conceive of circumstances in which to pass in legislative session a resolution like that first introduced by my distinguished and learned friend, the Senator from Georgia [Mr. Bacon], asking the President, if in his opinion not incompatible with the public good, to transmit the correspondence in a pending negotiation to the Senate, might be productive of mischief. I think the Morocco case is perhaps one which could be productive of mischief in this, that the President's declination, which would be within his power, upon the ground that the public good required that the correspondence should not be sent to the Senate, might give rise to an inference in other countries that something with reference to one or more of the parties was being concealed from them.

Mr. President, I do not stop at this moment to cite authorities in support of the proposition, that so far as the conduct of our foreign relations is concerned, excluding only the Senate's participation in the making of treaties, the President has the absolute and uncontrolled and uncontrollable authority. Under the confederation there was felt to be great weakness in a system that made the Congress the organ of communication with foreign governments; but when the Constitution was formed, it

being almost everywhere else in the world a purely executive function, it was lodged with the President. He was given the power, with all other Executive functions, "to receive ambassadors and other public ministers." His exercise of that function can not, under the Constitution, be controlled by any other body in the Government. That is a tremendous power given by the Constitution to the President—the power to receive or reject an ambassador or a public minister or any one of the representatives known to international law as it existed when the Constitution was adopted. That involves not simply the mere recognition of governments or administrations, but it involves sometimes the recognition of a new nation. It involves passing upon the question of independence. It involves decision as to the various changes which occur in the administration or government of nations—one administration or faction in power to-day, another next week, another a month later. The President decides. He was given the power to appoint "ambassadors, other public ministers, and consuls," which has been held to include diplomatic agents then known to international law and international intercourse. Those offices are not created by the appropriate compensation for those appointed by the President, but it has been well held and is irrefutable that under the Constitution the offices are created by that instrument, and he is given his own absolute will as to when he will appoint and whom he will appoint—

Mr. TILLMAN. Mr. President—

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from South Carolina?

Mr. SPOONER. Except as to confirmation by the Senate.

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from South Carolina?

Mr. SPOONER. Certainly.

Mr. TILLMAN. The Senator from Wisconsin having modified his statement to that extent, I will not allude to that point; but I should like to ask him, he having given us such a luminous exposition of the Constitution, what is the relation between the President and the Foreign

Relations Committee of the Senate? Do those men never advise?

Mr. SPOONER. Is the Senator serious in putting to me that question?

Mr. TILLMAN. I am.

Mr. SPOONER. I will give it a serious answer.

The relation of members of the Foreign Relations Committee to the executive department of the Government in its relation to foreign relations is precisely the relation which the Senator from South Carolina and his colleagues sustain to the executive department in its relation to foreign relations. The Committee on Foreign Relations, like the other committees of this body, is not an independent entity. Its members are Senators who are designated by the body to study and report upon certain subjects, and the committee therefore is but the servant of the Senate, as all other committees are. A member of the Foreign Relations Committee, as a Senator, in his relation to the Senate and executive department is only a Senator, just as those who are not on that committee are Senators.

Of course, it will sometimes happen that members of the Foreign Relations Committee, charged by the Senate with that particular subject, will obtain information as servants of the Senate, in order to bring it to the attention of the Senate, which other Senators might not seek; but that is all.

Mr. BEVERIDGE. It is a matter of expediency.

Mr. SPOONER. It is not a matter of expediency. It is a matter of industry, and a wise attempt at least to discharge the duty which the Senate has committed to them.

Mr. BEVERIDGE. They are not compelled to do it by the Constitution.

Mr. SPOONER. Oh, no.

Mr. LODGE. Mr. President—

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Massachusetts?

Mr. LODGE. I merely wish to remind him of a fact with which he no doubt is very familiar, that in the Administration of Mr. Madison the Senate deputed a committee to see him in regard to the appointment of a

minister to Sweden, I think, and he replied that he could recognize no committee of the Senate, that his relations were exclusively with the Senate. I have no doubt the Senator intended to recall that, but as he stated the exact relations as he understood them, it seemed to bear on that point.

Mr. SPOONER. I did not recall it; I am obliged to the Senator for recalling it; but I think I covered it—

Mr. LODGE. You did, entirely.

Mr. SPOONER. By saying that members of a committee have no relations to any Department of the Government, simply being servants of the Senate, which has the relation to the Departments of the Government. . . .

The President is so supreme under the Constitution in the matter of treaties, excluding only the Senate's ratification, that he may negotiate a treaty, he may send it to the Senate, it may receive by way of "advice and consent" the unanimous judgment of the Senate that it is in the highest degree for the public interest, and yet the President is as free when it is sent back to the White House with resolution of ratification attached, to put it in his desk never again to see the light of day as he was free to determine in the first instance whether he would or would not negotiate it. That power is not expressly given to the President by the Constitution, but it inheres in the executive power which inheres in him as the sole organ under the Constitution through whom our foreign relations and diplomatic intercourse are conducted. Out of public necessity the President should be permitted to pocket a treaty, no matter if every member of the Senate thought he ought to exchange the ratification. Why? Because the President, through the ambassadors, ministers, consuls, and all of the agencies of the Government, explores sources of information everywhere, it is his business to know whether anything has occurred since the Senate acted upon the treaty which would render it for the public interest that the ratifications be not exchanged. And he is empowered to withhold exchange of ratifications, if upon later knowledge he deems it for the public interest so to do.

The conduct of our foreign relations is a function which requires quick initiative, and the Senate is often in vacation. It is a power that requires celerity. One course of action may be demanded to-night, another in the morning. It requires also secrecy; and that element is not omitted by the commentators on the Constitution as having been deemed by the framers of the most vital importance. It is too obvious to make elaboration pardonable.

We ratified the arbitration treaty unanimously, I believe. The President, in the exercise of the power which no one can dispute, pocketed it. The President may negotiate and sign a proposed treaty, and not send it to the Senate. In such case what would be thought of a resolution asking him to inform the Senate whether he had negotiated such a proposed treaty, and why he had not sent it to the Senate? Having sent a treaty to the Senate, he may withdraw it the next day.

Mr. President, the three great coordinate branches of this Government are made by the Constitution independent of each other except where the Constitution provides otherwise. We have no right to assume the exercise of any judicial functions. The President may not assume judicial functions. The President may not assume legislative functions. We as the Senate, a part of the treaty-making power, have no more right under the Constitution to invade the prerogative of the President to deal with our foreign relations, to conduct them, to negotiate treaties, and that is not all—the conduct of our foreign relations is not limited to the negotiation of treaties—we have no more right under the Constitution to invade that prerogative than he has to invade the prerogative of legislation. . . .

The act creating the Department of State, in 1789, was an exception to the acts creating the other Departments of the Government. I will not stop to refer to the language of it or to any of the discussions in regard to it, but it is a Department that is not required to make any reports to Congress. It is a Department which from the beginning the Senate has never assumed the right to

direct or control, except as to clearly defined matters relating to duties imposed by statute and not connected with the conduct of our foreign relations.

We *direct* all the other heads of Departments to transmit to the Senate designated papers or information. We do not address directions to the Secretary of State, nor do we direct requests, even, to the Secretary of State. We direct requests to the real head of that Department, the President of the United States, and, as a matter of courtesy, we add the qualifying words, "if in his judgment not incompatible with the public interest."

What does the conduct of our foreign relations involve? Does it involve simply, do Senators think, the negotiation of treaties? It involves keeping a watchful eye upon every point under the bending sky where an American interest is involved, where the American flag and citizens of the United States are to be found on sea and on land, every movement in foreign courts which might invade some American interest. It involves intercourse, oral and written, conferences, administrative agreements and understandings, not included in the generic word "treaty," as used in the Constitution. All treaties are agreements, but all international agreements and understandings are not "treaties." . . .

My friend from Georgia [Mr. Bacon] seemed to think it extraordinary and novel that the President in exercising this constitutional power to conduct our foreign relations, should send delegates or representatives to the Moroccan conference. Where can there be found any warrant for denying that right? I think the Senator did not deny the right. We have been engaged in conferences before.

Mr. BACON. Mr. President—

The VICE-PRESIDENT. Does the Senator from Wisconsin yield to the Senator from Georgia?

Mr. SPOONER. Certainly.

Mr. BACON. I do not desire to interrupt the Senator.

Mr. SPOONER. I have no objection.

Mr. BACON. I desire not to do so. I prefer to answer the Senator afterwards, if I have an opportunity, rather than to take it up by piecemeal. . . .

SPEECH OF SENATOR BACON[3]

Mr. President: I have already addressed the Senate at some length upon the subject of the policy and propriety of sending delegates to the Algeciras Moroccan conference. It had not been my purpose to ask again the indulgence of the Senate upon this subject or upon questions which are nearly connected therewith. It has, however, happened that in the progress of the debate upon that subject and also on the subject of the Santo Domingo treaty certain propositions have been announced on the floor of the Senate and have been very earnestly and very ably discussed by learned and distinguished Senators, magnifying the powers of the President and minimizing the powers of the Senate, to which I can not give my assent and to which I ask the further indulgence of the Senate that I may make reply. . . .

The distinguished Senator from Wisconsin [Mr. Spooner] announces, as I understand him, the following proposition: That the negotiation of a proposed treaty and every phase of the work of considering and determining what shall be the subject and terms of a treaty are, up to and including the reaching of an agreement with a foreign power and until the proposed treaty is submitted to the Senate for final ratification or rejection, matters within the sole and exclusive right and power of the President; and that the jurisdiction of the Senate does not attach in any manner, and that no power or duty or right of the Senate begins until the President shall have negotiated a proposed treaty with a foreign power, shall have agreed with the foreign power on the terms of the same, and shall have sent it to the Senate; and that for the Senate to attempt either by inquiry or suggestion to have part or lot in such work prior to the submission to the Senate, is an intrusion upon the exclusive domain and jurisdiction of the President of the United States.

As to whether or not he is correct in that construction of the powers of the President and the want of the power in the Senate, must depend upon the language of the

[3] *Ib.* (XL, Pt. 3), pp. 2125-48, *passim.*

Constitution of the United States. Fortunately, so much of the language of the Constitution as relates to that is within a very small compass; it is in one sentence. It is the second paragraph of the second section of the second article of the Constitution, and it is in these words:

"He shall have Power,"—

Speaking of the President of the United States—

"He shall have Power by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur."

That is all there is in the Constitution as to the power of the President to make treaties and as to the right and power of the Senate to participate in the work of making treaties.

Now, Mr. President, it will be seen that in that language the word "negotiate" does not occur. There is no separate, express grant of power to negotiate a treaty. It is necessarily true, however, that the power to negotiate a treaty is an implied power involved in that language; in other words, the power "to make" a treaty necessarily implies the power to negotiate a treaty. But there may be a very great difference in opinion as to what is the meaning of the word "negotiate," if we assume it and concede it to be an implied power found in that language. So far as the power to suggest a treaty to a foreign power is concerned, or to receive a suggestion from a foreign power that a certain treaty should be made, or to discuss with a foreign power the subject or the terms of a proposed treaty, undoubtedly the power to negotiate within that narrow limit is one which can only be exercised by the President, because he alone under this clause can have direct communication with the foreign power. No other officer or authority on the part of the United States can submit a proposed treaty to a foreign power. No other authority can discuss with a foreign power the terms of a proposed treaty, or come to a preliminary agreement with the foreign power regarding the same. Within this restricted sense the implied power to negotiate a proposed treaty is in the President alone.

But it is evident that the learned Senator in this dis-

cussion does not confine his understanding of the word "negotiate" to such narrow limits in defining the power of the President in the making of treaties. Evidently the Senator intends to include in the exclusive power to "negotiate" a proposed treaty, the exclusive power to do everything connected with the policy or impolicy of a treaty prior to its actual submission to the Senate for its ratification. In other words, the Senator's proposition is that under this implied power to "negotiate" everything in the way of consideration of the advantage or the disadvantage, or of the propriety or the policy of making a treaty, or of its terms, is a matter for the exclusive suggestion and deliberation and determination of the President, and that any suggestion or inquiry or advice on the part of the Senate prior to such submission is gratuitous and intrusive, and, as has been suggested, even insulting to the President. The radical and extreme position of the Senator in this regard is best understood when the fact is known that his utterance above quoted is caused by the introduction of a resolution asking information concerning the instructions given to the delegates appointed to the Algeciras conference. That resolution the Senator condemns as intrusive upon the exclusive jurisdiction of the President. According to the contention of the learned Senator, alone in the brain of the President, alone in his suggestion and deliberation, and alone in his judgment must be evolved and shaped up the policies and measures, which, if they become law, are to be the supreme law of the land.

According to that contention, the Senate has nothing to do with it—no concern, no right to consider, no right to be heard, no right to inquire, no right to advise—until the President shall have thus perfected it according to his judgment and submitted it to the Senate, to receive at its hands a perfunctory—often, I should say, a perfunctory—reply of "yes" or "no"; and according to that contention to proceed beyond that is an intrusion upon the exclusive domain and jurisdiction of the President.

Mr. President, that proposition is not sustained either

by the letter or by the spirit of the Constitution or by the history of the treaty-making power as found in the history of the convention which framed the Constitution. On the contrary, they all, and the history as well of the adoption of this provision of the Constitution as found in the debates of the constitutional convention, combine to establish the proposition that in the making of treaties it is proper for the Senate to advise at all stages. Upon the very surface of it lies the oft-repeated suggestion that, if that were the case, the Constitution would limit itself to the term "consent."

Mr. SPOONER. Limit itself to what?

Mr. BACON. I say, if that were the correct construction, there is the oft-repeated suggestion that if it had been the intention of the framers of the Constitution to limit the action and function of the Senate solely to the power to ratify or to reject, the language of the Constitution would not have been "advise and consent," but the language would have been "consent," because there is no reason why the word "advise" should be given to add to or explain the meaning of the word "consent." We do not advise men after they have made up their minds and after they have acted; we advise men while they are considering, while they are deliberating, and before they have determined, and before they have acted.

As I have already said, Mr. President, there is no direct, express, separate grant of power to negotiate. The entire power is the power to make treaties; and yet the learned Senator would have us divide that power so that the term "to make" should be construed to mean, in the first place, in one division "to negotiate" and in another division "to conclude." But there is nothing in the words of the Constitution to justify any such division as that. It is one indivisible power "to make," and in the entire power "to make" the Senate is given full participation in advising and consenting.

The contention that the power of the President includes everything up to the time of the submission of the proposed treaty ot the Senate might be sustained if the language of the Constitution were that "the President

of the United States should have power to negotiate and, with the advice and consent of the Senate, to make treaties." Then it would indicate a separate function; then it would indicate a first division of the duty, to negotiate, the jurisdiction of which was confided entirely and solely to the President; and the second division, to make, one in which the President and the Senate together should act.

But the language of the Constitution is, "He shall have power, by and with the consent of the Senate, to make treaties," which plainly indicates not that the Senate should be limited to saying yes or no to a perfected and finished work when presented to it by the President, but rather the assistance of the Senate, the advice and co-operation of the Senate in the determination as to the propriety and policies of proposed treaties and also the terms and provisions they should contain. But the word "negotiate" is omitted before the words "to make." That is not an accidental omission. There was design in it. Aside from the fact that there is no ground upon which to predicate the suggestion that it was an accidental omission, the words used by the framers of the Constitution in the very next clause really only divided from it by a semicolon, prove that they were weighing carefully the language when they conferred the power upon the President of the United States. Separated from it only by a semicolon is this language—I will read the entire clause, part of which I have already read:

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;"—

Then follows the semicolon. Then the language proceeds:

"and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors," etc.

There it was the evidently distinct purpose to divide the duty and to confer in the first part of that division an exclusive function and jurisdiction upon the President of the United States:

"He shall nominate, and by and with the advice and consent of the Senate, shall appoint."

Showing that the purpose was that up to the time it was submitted to the Senate, the Senate had no function in the matter of appointment, and that the function of the Senate was limited to advising and consenting to the nomination previously made by the President in the discharge of a function and of a jurisdiction exclusively confided to him.[4]

Can it be said that the framers of the Constitution of the United States in writing a clause, or two parts of the same clause, were careless in the use of language when they were conferring the great power of treaty making; that they intended to say that the President should have the exclusive function up to the time of the submission of the treaty to the Senate, and that the duty and the power of the Senate, as the Senator from Wisconsin has said, should only begin when the President had so done, and that they used this language as found in the Constitution, leaving to be implied only the construction contended for; and then thereafter, in the less important matter of the appointing of officers, should have been critical in the use of language, leaving nothing to implication, and should have said "he shall nominate," and then added "and thereafter"—I interpolate the word "thereafter"—"and thereafter, by and with the advice and consent of the Senate, shall appoint"? Mr. President, it is incredible. . . .

The Senator from Wisconsin in his argument said that the President was supreme—he used the word "supreme" —in the making of treaties to the extent that even after a treaty was submitted to the Senate and ratified by the Senate, the President could put it in his pocket and not promulgate it or exchange ratifications.

No doubt that is true, and in the same way when the President sends a proposed treaty to the Senate, the Senate, if it sees proper to do so, can treat it without any attention whatever and not even refer it to a committee.

[4] This argument suggests another directly against Senator Bacon's main contention, since it is apparent that in connection with *appointments* the Senate's function of *"advice and consent" is* discharged by a mere "yes" or "no."

It would not be seemly to do so, but no more so than for a President to be likewise heedless and regardless of the views of the Senate in reference to the propriety or the policy of making a proposed treaty in a matter touching vitally the interests and the institutions of the country. It would be not less unseemly for him to reply to an inquiry or suggestion of the Senate, "Hands off."

In what particular is the power of the President thus to put a treaty ratified by the Senate in his pocket more supreme than the power of the Senate to bury in its archives without action a proposed treaty sent to it by the President? I am not detracting from the President or his power; I concede to him his full constitutional power; but I deny the proposition that the President has any superior power or any superior dignity in the making of a treaty over and above the Senate.

Mr. BEVERIDGE. Suppose the Constitution had been silent upon the question of the treaty-making power, where would that power have lodged? Or I will put the question in this way: Suppose the Constitution had said nothing about making treaties, would not the complete power of making treaties have been in the President, under section 1 of Article II, which lodges the executive power in the President?

Mr. BACON. I think not. I do not understand the word "executive" to mean anything of the kind.

Mr. BEVERIDGE. Does not the Senator think that in the natural division of the powers of Government into legislative, executive, and judicial the treaty-making power has always been considered an executive function, and, therefore, if the Constitution had been silent upon the subject of treaties, it would have been completely under the President's control, under that provision of the Constitution which confides in the President the executive power, and that that section concerning treaties is merely a limitation upon that universal power?

Mr. BACON. Oh, no. The Senator has gone to his favorite doctrine as to extraconstitutional power, which I will not stop to discuss with him to-day. The two continents, separated by the Atlantic Ocean, are not wider

apart than the Senator and I upon the subject of the exercise of powers not found in the Constitution. . . .

Mr. BEVERIDGE. I will ask this question: If the Constitution had said nothing about the treaty-making power, where would the treaty-making power have been lodged?

Mr. BACON. I have received that question from the Senator several times. I have said that I did not agree with him that it would be with the Executive.

Mr. BEVERIDGE. Where would it be?

Mr. BACON. I think, undoubtedly, in the legislative branch of the Government, for reasons which I will give.

Mr. BEVERIDGE. That is the whole question.

Mr. BACON. Here is where the sovereignty of the Government was intended to be in almost its totality—in the legislative branch of the Government, and the vast array of powers in the first article of the Constitution proves it; and, further than that, the Constitution of the United States was intended to take the place of and to supersede the Articles of Confederation, under which articles the power to make treaties did lodge in Congress alone; and it was not to be presumed when the Constitution was formed, in the absence of some special and particular designation, that it was the intention to confer it upon the Executive. The presumption would be the other way. . . .[5]

Mr. President, we have often had cited the fact that Washington during his Administration met personally with the Senate to advise as to the making of treaties. He had been present during all the deliberations of that Convention; he was president of the Convention which made the Constitution; he had heard all the deliberations; he had doubtless in personal interviews canvassed this matter and discussed it with members of the Convention, and the fact that he met personally with the Senate, the fact that he conferred personally with the Senate as to the propriety of making treaties before attempting to

[5] Senator Bacon here ignores the fact that the Congress of the Confederation possessed all the executive as well as the legislative powers of the United States. The question, therefore, whether the treaty making power is *executive* in its nature is not affected by its location in the Articles of Confederation.

negotiate them, show what he understood to be the intention of the Convention—that the Senate should be not simply the body to say yes or no to the President when he proposed a treaty, but that the Senate should be the adviser of the President whether he should attempt to negotiate a treaty. What possible doubt can there be under such circumstances as to what was his understanding of the purpose and intention of those who framed the Constitution? And what possible doubt can there be that his understanding was correct?

Mr. President, it is true that that practice has been abandoned, so far as concerns the President coming in person to sit in a chair on the right of the presiding officer to confer with members of the Senate, as our rules still provide he shall do should he come here personally, showing we recognize the propriety of his coming and his right to come. But nevertheless during my official term it has been the practice of Presidents and Secretaries of State to confer with Senators as to the propriety of negotiating or attempting to negotiate a treaty.

I know in my own experience that it was the frequent practice of Secretary Hay, not simply after a proposed treaty had been negotiated, but before he had ever conferred with the representatives of the foreign power, to seek to have conferences with Senators to know what they thought of such and such a proposition; and, if the subject-matter was a proper matter for negotiation, what Senators thought as to certain provisions; and he advised with them as to what provisions should be incorporated.

I recollect two treaties in particular. One is the general arbitration treaty. I do not know whether he conferred with all Senators, but I think he did. I think he conferred with every Senator in this Chamber, either in writing or in person, as to the general arbitration treaty. He certainly conferred with me.

Mr. SPOONER. Who did?

Mr. BACON. Mr. Hay. He certainly conferred with me, not only once but several times, and I presume he did the same with other Senators, not simply as to the ques-

tion whether a treaty should be negotiated, but as to what provisions should be incorporated in it. I am sorry to say that while agreeing with the purpose in view I could not agree with some of the provisions incorporated in that particular treaty, and he went on and the treaty was formulated with which in all particulars I did not agree. But I am simply speaking of the fact that he conferred with Senators before he formulated a treaty, not simply before the President sent it here, not simply before it was negotiated with Sir Mortimer Durand and the ambassadors of other countries, but before it had been formulated.

Then, as to another, I recollect distinctly the Alaskan treaty. Time after time and time after time Mr. Hay, then Secretary of State, conferred with Senators, and, I presume, with all the Senators, as to the propriety of endeavoring to make that treaty and as to the various provisions which should be incorporated in it, recognizing the delicacy of the situation, and the provisions of that treaty were well understood by members of the Senate and approved by members of the Senate before it was ever formulated and submitted to Sir Michael Herbert.

But what was Mr. Hay doing in all that time? Was he carrying out the contemplation of the Constitution? Was he engaged in the performance of a high duty? Was he availing himself of a valuable instrumentality, or was he simply engaged in the interchange of politeness?

Mr. SPOONER. Will the Senator permit me to make an inquiry of him?

Mr. BACON. With pleasure.

Mr. SPOONER. Does the Senator conceive of no distinction between consultation by the Secretary of State, if he so wills it, with Senators, and the participation of the Senate, as a body, the thing of which we are speaking, as a part of the negotiating power? . . .

Mr. BACON. Well, I will answer the Senator definitely. I do not recognize the distinction, and I will tell him the reason why.

When the President or the Secretary of State either—say, the President, to simplify it—asks a Senator what he thinks about the proposition to negotiate such and such a treaty, and what he thinks as to the specific terms to be incorporated in that treaty, he does not ask that Senator that question as he asks Mr. Jones or Mr. Smith, whom he happens to meet upon the Avenue, in order that he may have the advantage of advice and assistance from a man in whose intellectual processes and capacity he has confidence, but he asks him because of the fact that the Constitution makes the Senator his adviser, his constitutional, official adviser and counselor in the making of treaties.[6]

Now, Mr. President, if that is true, is that advice something which the President has exclusively within his control? Is it something which he can ask, and which he alone can get the benefit of in case he does ask, or is it a great constitutional provision which makes it a reciprocal right for a common benefit?

Can it be said that while it is proper for Senators or the Senate to respond when advice is asked, it is improper, under the constitutional provision, to volunteer such advice? It is undoubtedly true that the President alone determines whether he will approve and act upon the advice of the Senate, just as the Senate determines whether it will or will not approve a proposed treaty. But can it be contended that the Senate, although the constitutional adviser of the President, can only give advice when asked for it, and that it is an intrusion to proffer it when thus not asked for it? Where is the warrant in the Constitution for such contention? That it has not been so recognized by the President or by the Senate is shown by the fact that it has frequently happened that resolutions have frequently been passed by the Senate informing the President that the Senate would approve a treaty for a given purpose. Can it be said

[6] This argument is childish. If the President may obtain the Senate's *advice* by informal conferences with individual Senators, why may he not thus obtain its *consent* to a proposed treaty?

that while proper to thus notify the President, in advance, of what the Senate would approve in a treaty, it is improper to notify him also, in advance, of what it deprecates, if it is proposed to embody it in a treaty? Can it be proper for the Senate to offer advice or counsel to the President as to the policy or impolicy of a proposed treaty, and at the same time improper to ask for the information upon which to base such advice or counsel? Where is the logic of such a contention?

Again, can it be proper to advise the President as to the desirability and policy of negotiating a treaty where he has not taken any action relative thereto and where the suggestion originates with the Senate, and on the other hand be improper to advise him of the undesirability and impolicy, in the opinion of the Senate, in a case where it is reliably learned through other sources that he has begun to take or has taken action relative thereto? Where does the Senate get power to amend a treaty if its authority is limited to consenting to what the President has done? When the Senate has amended a proposed treaty and the President thereafter submits the amendment to the foreign power for its consideration, has not the Senate taken part in the negotiation of that treaty?

If the contention is correct that the jurisdiction and power of the Senate do not begin until the proposed treaty is sent to the Senate, then none of these things are proper, and to make an inquiry of the President relative to a proposed treaty is an intrusion upon his exclusive jurisdiction. If the contention is correct, it matters not what may be the well understood purpose of an Executive in negotiating a treaty or in sending delegates to a conference, the Senate is dumb until it receives a proposed treaty. It may be, as forcefully suggested by the Senator from Maine [Mr. Hale] a few days ago, that the proceeding tends inevitably to war, and yet it will be an intrusion for the Senate to even make an inquiry of the Executive concerning the same.

Again, the Executive may, without ever sending any proposed treaty to the Senate, continue to send delegates

to European international political conferences, and in time practically destroy our recognition of the long established doctrine of non-entanglement by us in such disputes. After having taken an active part by our delegates in the Algeciras conference, no proposed treaty may be submitted to the Senate. Nor is that all in sight. We are told in the press despatches that European questions concerning the Balkan States are again becoming acute; that there is great tension, and that another European war cloud is gathering in the East. Doubtless there will be another conference to deal with that situation and determine the relative rights and powers of the war lords of Europe. To that, according to the new doctrine, it will again be in order to send delegates from the United States. And after having taken an active part in the deliberations of the conference, again no proposed treaty may be sent to the Senate. And although in attending each of these conferences by our delegates tremendous strides will have been taken in establishing precedents and in destroying the doctrine of an hundred years against entanglements in European international disputes, still in the absence of any proposed treaty submitted, the Senate must be dumb, and it is an intrusion to even make an inquiry of the President in the interest of the preservation of the cherished policies of our country. Mr. President, I can not subscribe to such a doctrine. . . .

The Senator from Wisconsin, in order to accentuate and emphasize the fact that the President of the United States sat away up on a pedestal above us in all matters which related to treaty making, except the simple matter, as he himself expressed it, of "ratification," because he translates the words "advice and consent" as meaning in the common parlance "ratification," the Senator, I say, in order to emphasize that fact, goes further, and in the clauses of his speech which I have already read he puts up as the supreme power, the supreme controller in all foreign affairs, the President of the United States. The President, according to the Senator from Wisconsin, in all of our foreign affairs is supreme. . . .

What is the most important of all foreign relations?

Why, the most important of all foreign relations is the relation of peace and war. Can the President declare war? Can the President prevent a declaration of war? The President not only can not declare war, and it is not only conferred in terms upon Congress, but even if the President should be opposed to a proposed war, two-thirds of each Branch can declare war. It would not require his approval. There is the most important of all foreign relations. It does not belong to the President. Nor can the President alone make peace. He can only do so with the cooperation of the Senate.

The question of commerce is certainly an important matter of relation between two countries, and yet the President has no power over commerce with foreign nations. The power to regulate commerce is not simply withheld from the President, but it is expressly conferred upon Congress; and the subsidiary question as to what shall be the terms upon which the merchandise of a foreign country shall come to this country is a question largely important in foreign relations, and is one over which the President of the United States has no power. It belongs, under the Constitution, to the lawmaking power; and that lawmaking power can be exercised by Congress not only without the consent of the President, but over his objection.

The terms upon which foreign ships shall be allowed to enter our ports to do business with us is an important one in our foreign relations, but the power to fix and determine them is altogether with Congress.

The question as to whether or not citizens of another country shall be allowed to come to this country, and if so, upon what terms, is an important question of foreign relations; and yet the President has no power to control it. It is a question exclusively within the lawmaking power. The question whether this country will permit any of a certain nationality to come at all to this country is a question not with the President, but a question with the lawmaking power.

Nay, sir, the question whether this Government will hold any relations with a foreign country is a question

with Congress. It is entirely within the competency of Congress to pass a law that no citizen of a given country shall come to this country, that no goods shall be received from it, that no merchandise shall go from this country to it, that no letters shall come from it, that there shall be no intercommunication of any kind whatever. Who doubts the power of Congress to do so?

In other words, it is within the power of Congress to absolutely sunder the relations between this country and any given foreign country. When that is said the whole thing is said; when that is said the whole argument is exhausted as to where rests the supreme power in foreign affairs, because the whole must include every part. If it is within the power of Congress to absolutely sunder all relations of every kind, commercial, social, political, diplomatic, and of every other nature, it is certainly within the power of Congress to regulate and control every question subsidiary to that and included within it. Congress and not the President is supreme under the Constitution in the control of our foreign affairs.[7]

Now, Mr. President, there is but one question about which there is even any controversy as to the power of the President over foreign relations, and that is the one about which the Senator and myself have differed for years, and about which I presume we will continue to differ. It is as to the right of the President of the United States to finally recognize or finally refuse to recognize the independence of a revolutionary or rebellious country.

Of course, time does not permit me now to discuss that question at length. I have heretofore discussed it in the Senate, and while I am not very fond of labor, if the time shall ever come when that question is per se discussed, I shall endeavor to take my part in it, for it

[7] This is a non-sequitur. Congress, in the exercise of certain of its powers, can often determine the essential conditions of our foreign relations, but that *fact* does not determine the question of law—the question of *direct control*. Senator Bacon's argument can be reversed to prove that the President can regulate commerce. *Cf.* pp. 36-37, *supra*.

is a most interesting and important question. It is a matter to me of the strongest and most absolute conviction as a legal proposition. Of course, I do not question at all that where it is a question as to what is the de facto government in a fully independent country, that is a question which is practically determined by the President of the United States in the recognition of diplomatic relations, but where a country is in a condition of rebellion, which has asserted its independence and is endeavoring to establish its independence, and where the parent country is denying its independence and is by the force of arms endeavoring to put down the rebellion or the insurrection, to say that the President of the United States solely and alone can determine finally that question for this country, and that Congress has no power over it, is a matter to me absolutely without the domain of logic. I say in every act of that kind, the supreme power, the final power of decision, is with Congress, the lawmaking power, and whatever is done by the executive department in that regard is necessarily subject to the revision and control and reversal of the lawmaking power.

Why, Mr. President, we have seen in the papers that a province of Russia some month or two ago rebelled and set up an independent government, or, rather, professed to do so. We have heard nothing of it lately. I presume it has been suppressed. Suppose in a case of that kind, not this President, but any President, had taken upon himself to say, "I recognize that province as an independent government." To claim that that would have been a final, conclusive act on the part of the Government of the United States, and that Congress would in such case have no right or power to reverse the decision and save the country from war with Russia, is something to me, I say, beyond the possibility of comprehension. But I will not go into that argument now, because I know I would necessarily enter upon a field which in itself would be larger really, or as large, as the main one upon which I am now engaged in this discussion.

Mr. SPOONER. Will the Senator allow me to ask him a question?

The PRESIDING OFFICER (Mr. McCumber in the chair). Does the Senator from Georgia yield to the Senator from Wisconsin?

Mr. BACON. Certainly.

Mr. SPOONER. The Constitution gives to the President the power to receive ambassadors and ministers. Does the Senator think that the action of the President in the exercise of that function is subject to the control of Congress?

Mr. BACON. I have not the slightest doubt in the world that Congress, in such a case as I have just mentioned, could pass a law and send that ambassador back to the country from which he came.

Mr. SPOONER. What sort of a law would that be? I am not talking now about declaring war or severing diplomatic relations. . . .

Mr. BACON. Simply to say we would not have an ambassador at all from that country, because we did not recognize it as an independent country. That is the act of Congress I have in mind when I say it would control the President and reverse his decision recognizing that province as an independent nation.

Now, as to whether or not Congress should say to the President of the United States, You must not receive John Jones, or William Smith, or any other particular man from any particular country. Of course nobody contends Congress could do that. That is not the question at all. It is the question whether in the case where a country, or part of a country in rebellion to the mother country sets up a professed or pretended independent government and sends an ambassador to this country, the reception by the President of the United States of that ambassador is a conclusive and final determination on the part of the Government of the United States that henceforth there shall be no question but what that is an independent country so far as the recognition of this country is concerned. My reply to the Senator is that if such an ambassador were sent, Congress would have

it within its power to pass a law that it would not recognize it as a part of Russia, for instance, and when that law was passed it would be the duty of the President to give that ambassador his passports and no longer recognize him or any other as an ambassador from that pretended government. . . .[8]

Mr. BACON. Compared to this great array of sovereign powers granted to Congress, those conferred upon the President present a most striking contrast. He is clothed with the great power and responsibility of the execution of the laws, but beyond this the only prerogative of sovereignty with which he is exclusively invested is the pardoning power, and even that is denied to him in cases of impeachment by the House and conviction by the Senate. . . .

The greatness of the Presidential office does not consist in his will being the law to 80,000,000 people, but in the fact that the President in himself personifies the will of a great and free people as that will is expressed by them through another department of the Government. No man can shut his eyes to the fact that to that end, while they invested the President with all the great dignity and power of the Executive office, they carefully withheld from him the grant of the powers of sovereignty. Every power given to him was most carefully restricted and guarded.

While they gave him the power of the veto, they gave the Congress the power to override his veto by a two-thirds vote of each House.

While they gave him the power to make treaties with foreign nations, by and with the advice of the Senate, they refused to him the power to make such treaties without their sanction.

They gave him power to pardon those convicted of

[8] It is to be regretted that Senator Bacon did not mention by virtue of which of its powers Congress would have the right to pass such a "law." Of course nobody contends that the President's action would legally prejudice Congress in the exercise of any of its powers.

crime, but denied to him the power of pardon in cases of impeachment.

They gave him the power to appoint all civil officers, but except temporarily, when Congress is not in session, such appointments are of no validity until confirmed by the Senate.

They made him Commander in Chief of the Army and Navy, but they left it to Congress to determine what should be the size and constitution of the Army and Navy, and whether there should be any Army and Navy. They denied him the power to appoint a single officer of either the Army or the Navy, from the commanding officers to the lowest subalterns, unless each of such appointments should receive the confirmation of the Senate. They gave him no power to equip and maintain either Army or Navy for a day. They gave him no power to make war, nor can he of himself conclude peace. The power to make rules for the government and regulation of the Army and Navy is denied to him and is expressly conferred upon Congress. It is evident that as Commander in Chief of the Army and Navy he is but the Executive arm, and that in that capacity he is himself, in every detail and particular, subject to the commands of the lawmaking power.

Finally, they made the Chief Executive, as well as every other civil officer, from the head of the Cabinet to the most obscure civil official, subject to trial and removal from office, without appeal, upon impeachment by the House and conviction by the Senate—a power, in much conservatism and wisdom, but seldom exercised, but nevertheless a power, resting as it does, without defined limits as to what shall be deemed a high crime or misdemeanor, almost exclusively in the discretion of the House and Senate, which is the great safeguard against encroachment and official misconduct. . . .

But what I rose to say to the Senator was this: The Senator will read again, as I know he has read heretofore, the message, to which I alluded in the remarks which I submitted this morning, of President Washington to the House of Representatives, where

he declined to furnish them with certain information which they called for. I am not speaking now as to what the President can do, but what he ought to do, and what is recognized in him as proper to do. President Washington said, that while he refused to communicate it to the House, and gave as a reason that such things ought frequently to be kept secret, yet in that case he said it should be communicated to the Senate. He recognized the Senate. He did not say that it should be withheld, but he said the secret should be shared by the Senate with the President.

Of course I recognize the fact that the question of the President's sending or refusing to send any communication to the Senate is a matter not to be judged by legal right, but a question which has always been recognized as one of courtesy between the President and this body, and which the Senate—except, perhaps, in the case in which the Senator took a very notable part and to which I have had occasion heretofore to allude—has always yielded to the judgment of the President in the matter and has never made an issue with him about it.

Mr. SPOONER. I go beyond that.

Mr. BACON. But any resolution which I have introduced could have been easily answered by the President to the effect that, in his opinion, it was not compatible with the public interest; but the Senator and those who thought with him never allowed it to get to him.

Mr. SPOONER. If we had adopted the Senator's resolution, introduced in public, cabled to every court in Europe, coming from a distinguished member of the Committee on Foreign Relations of this body, which is a part of the treaty-making power, and the President had communicated to the Senate in secret session, how would the matter have stood abroad? If we had been honorable men and observed the obligation of secrecy, the communication of the President would have been confined to members of this body; outside there would have been this implied arraignment of the President, or disgust of the President, either as to his power or as to his wisdom, *with no reply whatever from the President.*

Mr. BACON. As it happened in this case, though, the State Department gave it out that there was no cause for secrecy and that anybody who went there could see it.

Mr. SPOONER. That is not what I am talking about.

Mr. BACON. A good many have gone there and have seen it. I have not.

Mr. SPOONER. I am talking upon the principle. The Senator says "legal right" or "legal duty." I admit that we have a right to pass resolutions calling for any information from the President; but does the Senator say it is the legal duty of the President to send it?

Mr. BACON. I do not dispute the fact that there may be occasions when the President would not.

Mr. SPOONER. Who is the judge?

Mr. BACON. The President, undoubtedly. Nobody has ever controverted that; and the very resolution concerning which the Senator is animadverting was expressly conditioned upon the President viewing the transmission of the information requested as being compatible with the public interest.

Mr. SPOONER. Mr. President, it all comes to an entire corroboration by the Senator of the proposition which I made the other day, and which I supposed he had spent some time in attacking, that in the last analysis, so far as the question of constitutional power and constitutional duty is concerned, it is absolutely in the President. He is the sole organ of communication by this Government with foreign governments. At his option he may consult the Senate in advance or he may not. At his option he may send information requested or he may not.

The Senator is mistaken when he says that all there is upon that subject in the Constitution is that line of the sentence which gives the President the power, by and with the advice and consent of the Senate, to make treaties. That is not all there is in the Constitution upon which I rely to sustain the proposition that under our system the President is the sole organ of negotiation and of communication between this country and foreign governments. Under the Confederation the Congress was the sole organ; the Congress negotiated treaties and

ratified treaties; the Congress received ambassadors and ministers, and the Congress practically sent ambassadors and ministers.

That was all changed when the Constitution was adopted. It was not changed for any idle reason. It was changed because it was found to be an inherent, elemental, and terrific weakness in the Confederation; and so, Mr. President, when the Constitution was formed they gave to the President, by and with the advice and consent of the Senate, the power to make treaties. That is not all. They vested in the President alone the power to receive ambassadors, ministers, and other diplomatic agents. That is not all. They vested in him the power to appoint, subject to the advice and consent of the Senate as to the person only, ambassadors, ministers, etc.

A foreign minister or ambassador comes to this country. We have no function to perform in relation to his reception. He presents his credentials to the President. The President receives him or not as he may decide. Can Congress compel his reception or prevent his being received by the President? I never heard that contended until the Senator intimated it this afternoon.

Mr. BACON. Mr. President, on the contrary, I said exactly the reverse. I said this—

Mr. SPOONER. The Senator said they could be sent away by order of Congress.

Mr. BACON. The Senator pressed me on that and asked me how it was done. I said the Congress could sunder the diplomatic relations between this country and another, and that that would be the law; but I expressly said that where relations were existing between the countries, so far as the recognition of a particular ambassador was concerned, or another ambassador, that was in the power of the President. If the Senator will notice the stenographic report, he will find that is exactly what I said.

Mr. SPOONER. Could the framers of the Constitution any more clearly have made the President the sole organ of communication between this Government and foreign governments than they did? Of course, the power to

receive an ambassador or a foreign minister implies necessarily the power to determine whether the government or country from which he comes is independent and entitled to send an ambassador or a minister. So the President is authorized to determine, and he must determine, when he sends an ambassador or a minister to some other country, whether that country is an independent country, a member of the family of nations, entitled to be represented by an ambassador or minister here and entitled to receive an accredited ambassador or minister from this country. When the ambassador or the minister has any communication to make in relation to foreign affairs, he does not make it to the Senate. If it be in the negotiation of a treaty—and most treaties are negotiated here—he has no communication with the Senate. We will not tolerate that ambassadors or ministers or diplomatic agents from other countries shall communicate in any way with the Senate or with the committees of the Senate.

Mr. BACON. The Senator says that with very great earnestness. Does the Senator understand that anybody has ever suggested such a proposition?

Mr. SPOONER. The Senator implies that almost of necessity—

Mr. BACON. Oh, no.

Mr. SPOONER. When he argues that under the Constitution the Senate as an executive body is as much a factor in the negotiation of treaties as is the President or is any factor at all in negotiation.

Mr. BACON. Yes; with its own peculiar functions to perform. That does not imply that—

Mr. SPOONER. If the Senator does not mean that, then the Senator does not mean anything by his proposition.

Mr. BACON. The Senator is mistaken; the Senator is not justified in that statement.

Mr. SPOONER. Because to say that the Senate is as much a factor under the Constitution in negotiating treaties as the President—

Mr. BACON. I did not say that.

Mr. SPOONER. Then I misunderstood the Senator.

Mr. BACON. I said in the making of treaties, and I distinctly denied that the making of treaties was confined to the function which would succeed the transmission of that treaty to the Senate.

Mr. SPOONER. Mr. President, I certainly am not mistaken. The whole point of the speech, which I had the honor of making the other day, and which the Senator has attacked—was my contention that in the *negotiation* of treaties the President is absolutely supreme and independent of the Senate.

Mr. SPOONER rose.

Mr. BACON. Pardon me a moment. But if the Senator meant to include in the term "negotation" not only that, but everything which related to the framing of the treaty the determination of its terms, and everything else up to the time when it was sent to the Senate, then his definition of the term "negotiation" was too broad, and I denied that the President had exclusive right in it; but so far as the term "negotiation" could be limited to its being the organ of communication and of discussion and of original suggestion, if you please, to the foreign power, I granted the Senator's position.

Mr. SPOONER. What does the Senator understand by the negotiation of a treaty as contradistinguished from the making of a treaty; dividing the negotiation of the treaty from the point of jurisdiction of the Senate over the treaty?

Mr. TILLMAN rose.

Mr. SPOONER. If you please, one at a time.

Mr. BACON. I said that the Senator's position was that "negotiation" included everything up to the time the treaty was sent to the Senate; I said that "negotiation" was a term which was implied under the term "make"; that the making of a treaty included the entire operation by which a treaty was conceived and framed and brought to its conclusion, and as to all such matters, even before it was submitted to a foreign power, while it was under consideration as to whether there should be a treaty and what its terms should be—that that was a part of the making of a treaty and not a part of what

technically the Senator calls the "negotiation of a treaty."

Mr. SPOONER. It would be nonsense, Mr. President, to talk of the President *negotiating* a treaty and yet of his not having the absolute power to reduce to writing the terms agreed upon at the end of his negotiation. He must have something to lay before the Senate. Is the signing of the treaty a matter that the Senate has anything to do with? Until the President is through the Senate's function does not begin.

I admit that the Senate may ask to be informed as to the state of the negotiation. The Senate may ask the President to inform it as to its terms. It may request him to send a copy in order that it may advise him, if it wants to do it, that it should be signed or not, or whether it should be amended before being signed. But the President has the same right to refuse to do it that the Senate has to request it.

Mr. BACON. Yes. . . .

Mr. SPOONER. If the framers of the Constitution had intended to make the Senate a potential factor in the negotiation of treaties, they would have done it.

Mr. BACON. I think they have done it.

Mr. SPOONER. They would not have left the President entirely at liberty to refuse the Senate any participation, even to the extent of informing the Senate, in response to a courteous request, of the state of the negotiations or the subject-matter of a proposed treaty. They would have given the Senate the right to *demand,* not to request. They would have made it the duty, not compellable by mandamus—no, no; they would have made it the sworn duty of the President to respond to the request for information. They did neither, Mr. President. It would have been a breach of constitutional duty for the President to refuse information which under the Constitution the Senate had a right to demand, and the President would have been answerable on the complaint of the other House. Had they intended not to invest the President with the absolute power of the negotiation of treaties, they would have made the Senate's power efficient. They would not have made it a mere question

of "If you please, Mr. President, the Senate would like to be informed of the status of the negotiation, if any exists, between this country and Great Britain." They never would have left it in that way. . . .

It is clear as the sunlight that the framers of the Constitution intended the President should negotiate the treaty, for he is the organ of communication with foreign governments. They gave that power to no one else, and the Senate could not advise and consent to the treaty *until it had been negotiated and signed and laid before it.* Somebody must do that preliminary work. If it is not given to the President, it is given to no one. It was given to the President. He has done it from the foundation of the Government. No one has ever challenged it. The Senate, to my knowledge, never has demanded a right to participate in the *negotiation* of treaties. Whenever the President has consulted the Senate it has been entirely in the exercise of an option which the Constitution gives him. He may exercise it or not. He keeps his oath to support and defend the Constitution as faithfully in the one case as in the other. The great sage of Democracy, Mr. Jefferson, did not agree with the Senator from Georgia or the Senator from South Carolina— . . .

I do not know whether it will be any "light" to the Senator from South Carolina, but in Mr. Jefferson's Opinion on the Powers of the Senate, a very celebrated document, which he gave at the request of the President, this language was used:

"The transaction of business with foreign nations is *executive altogether.* It belongs, then, to the head of that department, except as to such portions of it as are especially submitted to the Senate. *Exceptions are to be construed strictly.*"

That is what Mr. Jefferson said on this precise question in a carefully prepared opinion for the guidance of the President, whose Cabinet officer he was. To give the opinion was a part of his official duty under the Constitution. . . .

He says another thing on the subject of the powers of the Senate:

"The Senate is not supposed, by the Constitution, to be acquainted with the concerns of the executive department. *It was not intended that these should be communicated to them.*"

Senator Bacon's main proposition seems to be that the Senate has the right to proffer the President its advice at every stage in the negotiation of a treaty. No doubt it may; and so may Tom, Dick or Harry. Moreover, the President remains free to ignore the advice—for such is the nature of *advice*. The more important question is whether the Senate, in giving advice, is confined to its own information or may *require* additional information from the President. Both Senator Bacon and Senator Spooner seem to be agreed that whether the President shall furnish the Senate with information touching foreign relations rests with his discretion. For the rest, Senator Bacon's speech is interesting for its statement of the different ways in which Congress may, in the exercise of its constitutional powers, affect our foreign relations, and for the indication it gives of the informal contact maintained between the President and the Senate through the membership of the Foreign Relations Committee.

CONCLUSION

The two main principles which continually recur in the foregoing pages are: first, the principle that, in Jefferson's words, "the transaction of business with foreign nations is executive altogether"; and secondly, the principle that Congress is not to be prejudiced constitutionally in the exercise of its powers by what the Executive has done in the exercise of his. Judicially enforceable constitutional limitations do not, generally speaking, obtain in the field of the diplomatic powers of the Government. The result is that the construction of these powers has fallen principally to those who wield them, and so has not erred on the side of strictness; and furthermore, that as between the organs of government sharing these powers, that organ which possesses unity and is capable of acting with greatest expedition, secrecy, and fullest knowledge—in short, with greatest efficiency—has obtained the major participation. Nor can it be reasonably doubted that these results have proved beneficial. At the same time, they counsel the maintenance in full vigor of the political check on a power so little susceptible of legal control.

More in detail, the principal fruits of the doctrine that the control of foreign relations is an executive prerogative may be summarized thus: an unlimited discretion in the President in the recognition of new

governments and states; an undefined authority in sending special agents abroad, of dubious diplomatic status, to negotiate treaties or for other purposes; a similarly undefined power to enter into compacts with other governments without the participation of the Senate; the practically complete and exclusive discretion in the negotiation of more formal treaties, and in their final ratification; the practically complete and exclusive initiative in the official formulation of the nation's foreign policy. The war making powers which the President has gradually taken to himself also derive partly from this doctrine, but more largely from two other sources: first, from the coalescence which took place at the time of the Civil War between the President's agency in the enforcement of the laws and his power as Commander-in-Chief of the Army and Navy; secondly, from our proximity to weak disorderly neighbors, who demand rough handling occasionally but are rarely worth a real war.

Partially offsetting this accession of powers to the Executive are certain practices and principles safeguarding the discretion of Congress. Thus the House of Representatives has maintained its right, at least formally, to pass upon the merits of treaties before assenting to appropriations to carry them out; also it has asserted successfully a participation in the making of customs agreements. Meanwhile, Congress has established its practically exclusive right to abrogate treaties, both in their quality as law of the land and as international engagements; and recently it has asserted a highly questionable supervision over diplo-

matic grades. Its alleged right of recognition has, however, remained a mere shadow.

On the whole, therefore, the net result of a century and a quarter of contest for power and influence in determining the international destinies of the country remains decisively and conspicuously in favor of the President. It is an outcome calculated to give pause to those who harp so unceasingly at "secret diplomacy," to say nothing of those who would wage wars by referendum. For if a nation situated as America has been in the past has found it necessary to centre the control of its foreign policies more and more in the hands of one man, what of European states? One may avoid fatalism and yet cherish the conviction that historical institutions are seldom correctly assessed in indiscriminate abuse.

INDEX